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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 282. 32

THE NEW ORLEANS, MOBILE AND TEXAS RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSISSIPPI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

FILED OCTOBER 12, 1877.

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1 To the honorable the judges of the Supreme Court of the United States of America:

The petition of the New Orleans, Mobile & Texas Railroad Company respectfully represents:

That in a suit commenced in the circuit court of the county of Hancock, State of Mississippi, in the name & behalf of the State of Mississippi, against your petitioner, a judgment was rendered against the petitioner, which judgment was removed to the supreme court of the State of Mississippi, and at its summer term of A. D. 1876 the judgment of the circuit court was affirmed, and your petitioner condemned, to its manifest injury and grievance.

Your petitioner further states that upon the trials of the cause in the courts aforesaid, the matter in issue was whether a bridge constructed by the petitioner under the terms of their charter, as granted by the State of Mississippi, was a lawful structure, and whether the said State could abate the same; & your petitioner claimed that there was a contract between the State & the company whereby the said structure was authorized & justified, & that the said bridge over the Pearl
2 River had been declared by the Congress of the United States to be a lawful structure, & the railroad in connection therewith a post-road and validated. But that this claim of the petitioner was overruled by the court aforesaid.

Your petitioner also shows that a motion was made in the circuit court of Hancock County for the removal of the cause to the circuit court of the United States, under the provisions of the act of Congress of 3 March, 1875 (18 Statutes at Large, p. 470), and the conditions of the statute complied with to entitle the petitioner to the removal, but that the circuit court of the county of Hancock and the supreme court of the State respectively denied the removal of the suit aforesaid, & refused to suspend proceedings in the said suit.

Your petitioner tenders a bond for the purpose of obtaining a writ of error to the said supreme court of the State of Mississippi to suspend all proceedings upon the judgment aforesaid, & to direct the
3 said court to remit the record of the cause to the Supreme Court of the United States to be held on the 2nd Monday of October next, in order that the errors in the said record & proceedings, if any, may be corrected.

J. A. CAMPBELL,
Atto. for Petitioner.

The above application granted.
Oct. 13, 1876.

JOS. P. BRADLEY,
Asso. Justice Sup. Court.

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Mississippi, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the New Orleans, Mobile and Texas Railroad Company, appellant, and the State of Mississippi, appellee, wherein was drawn in question the

validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statue of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the de-
5 cision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellant, as by its complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday in October next in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the thirteenth day of October, in the year of our Lord one thousand eight hundred and seventy-six.

Issued 13 Octo., 1876.

[SEAL.] D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by

JOSEPH P. BRADLEY,
Asso. Justice Sup. Ct. U. S.

OCT. 13, '76.

6 The United States of America to the State of Mississippi, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Mississippi, wherein the New Orleans, Mobile and Texas Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Joseph P. Bradley, associate justice of the Supreme Court of the United States, this thirteenth day of October, in the year of our Lord one thousand eight hundred and seventy-six.

JOSEPH P. BRADLEY,
Asso. Justice Sup. Ct. U. S.

7 Received this 19th day of October, A. D. 1876.

J. L. LAKE, JR.,
U. S. Mar. So. Dist. Miss.,
By M. M. McLEOD, *D'p'ty.*

Executed personally on Hon. J. M. Stone, gov'r of the State of Mississippi, by exhibiting to him this writ, stating contents, and delivering to him a true copy thereof this 20th day of October, A. D. 1876.

J. L. LAKE, JR.,
U. S. Marshal So. Dist. Miss.

8 The United States of America to the State of Mississippi, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Mississippi, wherein the New Orleans, Mobile and Texas Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Joseph P. Bradley, Associate Justice of the Supreme Court of the United States, this thirteenth day of October, in the year of our Lord one thousand eight hundred and seventy-six.

JOSEPH P. BRADLEY,
Asso. Justice Sup. C't U. S.

9 Received this 19th day of October, A. D. 1876.

I, George E. Harris, attorney-general for the State of Miss., hereby accept service of this writ and acknowledge the receipt of a true copy of the same this 25th day of Oct., A. D. 1876.

GEO. E. HARRIS,
Attorney-General of Mississippi.

Marshal's costs: Service, 2 d'f'nd'ts, 4.00; copies, 1.00; E. & R., 50 —5.50.

J. L. LAKE, JR.,
U. S. Marshal So. Dist. Mississippi.

10 *Bond for writ of error.*

Circuit court of the United States of America for the southern district of Mississippi, in the fifth circuit.

THE STATE OF MISSISSIPPI
vs.
NEW ORLEANS, MOBILE & TEXAS RAILROAD Company.

Know all men by these presents that we, Edwin D. Morgan and James A. Raynor, trustees and receivers for that part of the New Orleans, Mobile and Texas Railroad in and between the cities of New Orleans and Mobile, are held and firmly bound unto the above-named State of Mississippi in the sum of three thousand dollars, to be paid to the said State of Mississippi, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the sixth day of October, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas the above-named New Orleans, Mobile and Texas Railroad Company has prosecuted to the Supreme Court of the United
11 States a writ of error to reverse the judgment rendered in the above-entitled suit by the judges of the supreme court of the State of Mississippi for the State aforesaid:

Now, therefore, the condition of this obligation is such that if the above-named defendant shall prosecute the said writ to effect, and answer all damages and costs if the said defendant fail to make their said writ of error good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

E. D. MORGAN,
JAMES A. RAYNOR,
Trustees and Receivers.

Sealed and delivered, and taken and acknowledged, this 6th day of October, 1876, before me.

EDWARD L. OWEN,
U. S. Commissioner for the Southern District of New York.

This bond approved Oct. 13, 1876, by—

JOS. P. BRADLEY,
Asso. Justice Sup. Court U. S.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Before me, a commissioner of the United States for the district aforesaid, came Edwin D. Morgan, who, being duly sworn, did depose and say that he is worth the sum of three thousand dollars over and above all his just debts and liabilities.

12 Sworn to this 6th day of October, A. D. 1876, before me.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Before me, a commissioner of the United States for the district aforesaid, came James A. Raynor, who, being duly sworn, did depose and say that he is worth the sum of three thousand dollars over and above all his just debts and liabilities.

Sworn to this 6th day of October, A. D. 1876, before me.

13 THE STATE OF MISSISSIPPI,
Hancock County:

Circuit court to June special term, A. D. 1875.

Be it remembered that on this day, that is to say, on the 1st day of June, A. D. 1875, the State of Mississippi, by her attorney, filed in the clerk's office of the circuit court of said county her petition against the New Orleans, Mobile and Chattanooga Railroad Company, which petition is couched in the following words and figures, to wit:

THE STATE OF MISSISSIPPI,
Hancock County:

In the circuit court in vacation.

To the honorable Green C. Chandler, judge of the first circuit court district of said State, sitting in said county:

The petition of Daniel B. Seal, district attorney for the said circuit court district, who sues on behalf of the State of Mississippi, and in the name of the State aforesaid, respectfully showeth:

That the New Orleans, Mobile and Chattanooga Rail Company, a corporation incorporated by an act of the legislature of the State of Alabama, was incorporated and granted certain corporate privileges and powers in the State of Mississippi by an act of the legislature of the said State
14 of Mississippi, entitled "An act in relation to the New Orleans, Mobile and Chattanooga Railroad Company, a corporation of the State of Alabama, and authorizing and empowering said company to exercise and enjoy the corporate powers and franchises in the State of Mississippi," approved Feb. 7th, 1867*th*.

That by said act of incorporation said railroad company was empowered and authorized to construct, maintain, use, and manage a railroad upon a course or route deemed most proper and best adapted, from the line between the States of Louisiana and Mississippi, and thence to any point on the line between said States of Alabama and Mississippi, said railroad to be constructed to extend from the city of Mobile, in the State of Alabama, to the city of New Orleans, in the State of Louisiana, and by said act of incorporation said railroad company was authorized and empowered to construct and maintain its railroad over and across any of the waters of this State on the line of the same: Provided, however, that in the central portion of the channel of Pearl River, of the bay of St. Louis, of the bay of Boloxi, and of the East Pasagula River, and in each of them, said company should construct and maintain a
15 drawbridge, which, when open, shall give a clear space for the passage of vessels of not less than sixty feet in width, and said company, after the construction of the said drawbridges, shall at all times thereafter provide that said drawbridges shall be opened for the passage of any and all vessels seeking to pass through same without unnecessary delay: Provided, however, that in case the company shall locate the line of their road across the channel of the Rigolet at a point south of or below the principal entrance of Pearl River into the Rigolet, then the said company shall not be required to construct a drawbridge across any bayou leading into Pearl River or across any small pass or mouth of said river.

It is also provided that such part of this section as relates to Pearl River, if the line of the road shall be located across the said river at a point where it constitutes the boundary line between the State of Mississippi and the State of Louisiana, shall not take effect until the State of Louisiana has consented to and authorized the same, or said company has built such a *a* bridge across said Pearl River for its said railroad as shall be in accordance with this section, and also with any
16 authority or power granted to said company by the said State of Louisiana in the premises, and such drawbridge may be built in the centre of the channel of said Pearl River, or in that portion of the same within the territory of the State of Louisiana or of this State, as most convenient for public use.

Your petitioner further showeth that the said railroad company, under

and by virtue of their said charter, proceeded to construct their said railroad through the State of Mississippi, passing through the counties of Hancock, Harrison, and Jackson, and have maintained the same since the year A. D. 1871, but said company failed and neglected to construct and maintain a drawbridge in the central portion of Pearl River, or any drawbridge in that river, but constructed a permanent bridge without any draw, which obstructs the navigation of said river, and is a public nuisance, to the great damage and detrement of the people of the State of Mississippi.

Your petitioner further showeth that Pearl River is a navigable river by the common law and the law of nations, in which the tide ebbs and flows for twenty or thirty inches above said bridge, and is navi-
17 gable for steamboats for more than two hundred miles, and has been navigated from time immemorial. That said railroad bridge is located about one mile from where said river debouches or empties into Lake Borgne, an arm of the sea, and vessels drawing nine or ten feet of water can enter into said lake by Cat Island Pass, and through it into Pearl River, and ascend said river fifteen or twenty miles to the town of Gainesville, in said county of Hancock, but for the obstruction caused by said bridge. That Pearl River is the boundary between the State of Mississippi and the State of Louisiana, and that neither of said States have a right to obstruct the free navigation of said river, or to authorize or empower others to do so, but, by the act of Congress entitled "An act to enable the people of the western part of the Mississippi Territory to form a constitution and State government, and for the admission of said State into the Union, on an equal footing with the original States," passed March 1, 1817, it was, among other things, provided "that the Mississippi River, and the navigable rivers and waters leading into the same, or into the Gulf of Mexico, shall be com-
mon highways and forever free, as well as to the inhabitants of
18 said State as to other citizens of the United States," which was a condition on which the State of Mississippi was admitted into the Union, and an engagement on the part of the United States that all of the navigable rivers and waters em'tying into the Gulf of Mexico should forever be free to all the inhabitants of the State of Mississippi, and said Pearl River does lead and empty into the Gulf of Mexico.

Your petitioner avers that the construction and maintaining said bridge across said Pearl River is purprestive and public nuisance and obstruction to the navigation of said Pearl River, and cause a permanent and irreparable injury and damage to the State of Mississippi and the citizens and inhabitants thereof, as well as to the commerce of the United States and the world, and is a direct and palpable violation of the law and of the charter of said railroad company.

And your petitioner avers that the said railroad company are legally bound and required, by the terms of its charter as well as by the common law, to remove and abate such nuisance, and to construct and maintain a drawbridge in the central portion of said Pearl River which, when open, shall give a clear space for the passage of vessels of not less than sixty feet in width, and after the construction of said draw-
19 bridge at all times thereafter, provided that said drawbridge shall be opened for the passage of any and all vessels seeking to pass through the same without unnecessary delay.

Your petitioner fu'ther shows that the main stream of Pearl River, which is the boundary line between the States of Mississippi , does not empty into the Rigolets, but that there is a communication from Pearl River into the Rigolets through a bayou and lake in which there is not

more than six or six and half feet of water, three feet less than in the mouth of Pearl River.

Your petitioner therefore prays for a writ of mandamus to be issued out of and under the seal of said circuit court directed to the New Orleans, Mobile, and Chattanooga Railroad Company and the president and directors thereof, directing and commanding said company to abate said nuisance, and to construct and maintain in the central portion of the channel of Pearl River, where said railroad crosses the same, a drawbridge which when open shall give a clear space for the passage of vessels of not less than sixty feet in width, and after construction of the said drawbridge at all times provide that said drawbridge shall be opened for the passage of any and all vessels seeking to pass through the same without unnecessary delay, and for general relief; and that petitioner recover her costs in this behalf expended, and that said writ be made returnable before your honor, in vacation, in not less than twenty nor more than thirty days, at the court-house of Hancock County in the State of Mississippi.

(Signed) W. A. CHAMPLIN.
(Signed) D. B. SEAL,
District Attorney, of Counsel.

THE STATE OF MISSISSIPPI,
Hancock County:

Personally came and appeared before me, Green C. Chandler, judge of the first judicial circuit court district of said State, Daniel B. Seal, who, being by me first duly sworn, deposeth and saith that the matters and things set forth and stated in the foregoing petition are true to the best of his knowledge and belief, and that a speedy trial of said writ is necessary to the ends of justice, and that a delay to the next ensuing term of said circuit court will be productive of great injury to the petitioner.

(Signed) D. B. SEAL.

Sworn to and subscribed before me this 31st of May, 1875.

(Signed) G. C. CHANDLER,
Judge Circuit Court.

To the clerk of the circuit court of Hancock County in the State of Mississippi.

Let a writ of mandamus issue as prayed for in the foregoing petition, returnable before me at the court-house of said county in the city of Bay St. Louis, on the 24th day of June, A. D. 1875, on which day is ordered that said writ and cause shall be tried before me in vacation on that day and at that place.

(Signed) G. C. CHANDLER,
Judge 1st Circuit Court District.

(Marked:) Filed June 1st, 1875.
(Signed) T. J. MURPHY, *Clerk.*

Whereupon, on the 2nd day of June, A. D. 1875, the sheriff of said county made the following endorsement on the petition, which endorsement is couched in the following words and figures, to wit:

Received in office this the 2nd day of June, A. D. 1875, and duly executed the same by delivering to W. G. Beers, agent of the New Orleans,

Mobile and Chattanooga Railroad Company, a true copy of the within petition for a mandamus, this the 2nd day of June, A. D. 1875.

(Signed) JNO. J. SAUCIER, *She*

Whereupon, on the day last aforesaid, that is to say, on the 2nd
22 day of June, A. D. 1875, a writ of mandamus was issued out of the clerk's office of the circuit court of Hancock County, which writ of mandamus is couched in the following words and figures, to wit:

THE STATE OF MISSISSIPPI,
Hancock County:

To the New Orleans, Mobile and Chattanooga Railroad Company and the president and directors thereof.

You are hereby commanded to construct and maintain in the central portion of the channel of Pearl River where said railroad crosses the same, a drawbridge which when open shall give a clear space for the passage of vessels of not less than sixty feet in width, and after construction of said drawbridge, at all times provide that said drawbridge shall be opened for the passage of any and all vessels seeking to pass through the same without unnecessary delay, and for general relief.

You are hereby commanded to be and personally appear before his honor, Green C. Chandler, judge of the 1st judicial circuit court district sitting in vacation at the court-house thereof in the city of Bay St. Louis, on Thursday, the 24th day of June, A. D. 1875, then and
23 there to show cause, if any they have or can, why the said writ of mandamus should not be made *preem'torily*.

Witness the honorable Green C. Chandler, judge of the 1st judicial district of the said State of Mississippi, the 1st Monday of May, A. D. 1875.

Issued the 2nd day of June, A. D. 1875.

[L. S.] (Signed) T. J. MURPHY, *Clerk.*

To the sheriff of Hancock County to execute and return.

Whereupon, on the day last aforesaid, that is to say, on the 2nd day of June, A. D. 1875, the sheriff of said county made his returns on the foregoing writ of mandamus, which returns are couched in the following words and figures, to wit:

Received in office this 2nd day of June, A. D. 1875.

(Signed) JNO. J. SANCIER, *Sheriff.*

Executed this writ this 2nd day of June, A. D. 1875, upon Wm. G. Beers, station agent and legal agent of said N. Orleans, Mobile and Chattanooga Railroad Company at Bay St. Louis, in person, by handing to him a true copy thereof.

(Signed) JNO. J. SANCIER, *Sheriff.*

Be it remembered that on the day last aforesaid, that is to say, on the 22nd of June, A. D. 1875, the defendants, by their attorneys, John
24 A. Campbell and R. Seal, filed in the clerk's office of the circuit court of said county their answer, also a map of the coast survey which answer and map is couched in the following words and figures, to wit:

THE STATE OF MISSISSIPPI,
Hancock County:

In the circuit court of the first judicial district sitting in the county of Hancock aforesaid, June term, 1875.

THE STATE OF MISSISSIPPI
vs.
NEW ORLEANS, MOBILE AND CHATTANOOGA Railroad Co.

On petition of district attorney.

The New Orleans, Mobile and Chattanooga Railroad Company, now designated as the New Orleans, Mobile and Texas Company, a corporation of Alabama, and the new designation being according to a law of that State adopted in 1871, by their attorney, comes and for answer to the petition of the said plaintiff says:

That a mandamus ought not to be granted for the reason that the cases as made in the petition does not justify or warrant the employment of the said writ, and that this defendant ought not to be required to answer in reference to the prayer for the said writ; and that
25 said corporation avers that the general assembly of the State of Alabama, on the 24 November, 1866, passed an act to incorporate the New Orleans, Mobile and Chattanooga Railroad Company with authority to make a railroad to connect the cities of Mobile and New Orleans, and for that purpose to obtain franchises and privileges from the States of Louisiana and Mississippi to construct, maintain, and operate their railroad in those States, and also from the United States to sanction and maintain them in the enjoyment of the same, and the defendant avers that the legislature of the State of Mississippi did enact a statute relative to the said corporation and authorizing and empowering it to exercise corporate powers and franchises in the State of Mississippi, and did grant to the said corporation rights and privileges and franchises by the said statute, approved 7th Feb'uary, 1867, and which is reference to in the said petition filed in this case.

2. The defendant, for fu'ther answer, says that in the sixth subsection of the second section of that act the location of the road in the State of Mississippi, and the designation of the mode and places for mak-
26 ing bridges are declared. It is provided that the said corporation is authorized and empowered to construct and maintain its railroad over and across any waters in this State on the line of same by bridges: Provided, however, that in the central portion of the channel of the Pearl River, of the bay of St. Louis, of the Bay of Biloxi, and of the east of the Pasagoula River, and in each of them, said company shall construct and maintain a draw-bridge, which, when open, shall give a clear space for the passage of vessels not less than sixty feet in width, "and said company after the construction of said draw-bridge shall at all times thereafter provide that said draw-bridges shall be opened for the passage of any and all vessels seeking to pass through the same without unnecessary delay."

The defendant avers that as to all of the streams mentioned in the foregoing clause of the said enactmen there has been exact performance by the company, except in reference to the central portion of the channel of Pearl River. But the clause succeeding that above granted

explains and controls, in reference to that river, and supplies the reason for the act of the company.

27 3. The act proceeds, provided, however, that in case the company shall locate the line of their road at a point south or below the principal entrance of the Pearl River into the Rigolet, then the said company shall not be required to construct a draw-bridge across any small pass or mouth of said river. It is also provided that such part of this section as relates to Pearl River, if the line of the road shall be located across the said river at a point where it constitutes the boundary line between the State of Mississippi and the State of Louisiana, shall not take effect until the State of Louisiana has consented to and authorized the same, or said company has built a bridge & ff.

4. And the defendant avers that the said company did locate the line of their road across the channel of the Rigolet at a point south and below the principal entrance of Pearl River into the Rigolet, and did construct the bridge across the Rigolet with the draw as prescribed in the said act, which has been maintained from that date.

And the defendant further avers that the general assembly of the State of Louisiana, in an act adopted by the same relative to the

28 New Orleans, Mobile and Chattanooga Railroad Company, a corporation of the State of Alabama, and authorizing and empowering said company to exercise and enjoy corporate powers and franchises in the State of Louisiana, approved 19th August, 1868, did provide "that in case the company shall locate their road across the great Rigolet at a point south or below the principal entrance of Pearl River into the great Rigolet, then the company shall only be required to construct one draw-bridge, which shall be in the channel of the great Rigolet, as hereinafter named."

And the defendant further avers that thus by the terms of the acts of the general assembly of the two States of Mississippi and of Louisiana, the said railroad company did locate and construct their railroad and bridges according to the terms they prescribed and dictated, and that they dispensed with bridges with draws at the entrances of the Pearl River into Lake Borgne, in any other branch or place that which come into the great Rigolet, and for the reason that the branches

29 did communicate with that great channel and through that with Lake Borgne.

5. And the said defendant further answer and avers that the surveys of the said railroad were made and the work done in the years 1868 and 1869 confirmably to the power and authority of the States of Alabama, Mississippi, and Louisiana for the year last aforesaid, the said railroad has been, and is a great public highway through these States and connecting them with other portion of the United States, and that the Congress of United States in view of the magnitude of the work and the cost of its construction and to expedite it, did, by an act entitled "An act to establish and declare the railroad and bridges of the New Orleans, Mobile, and Chattanooga Railroad Company as hereafter constructed, a post-road, and for other purposes," approved March the 2nd, 1868, authorized and empowered the said corporation to construct, build, and maintain bridges over and across the navigable waters of the United States on the route of said railroad between New Orleans and Mobile for the use of the company, and the passage of its engines, cars, trains of cars, passengers, mails, and merchandise, and that the railroad

30 and its bridges when complete and in use were to be held and deemed lawful structures, and a post-road. The said act required draw-bridges on the Pasagoula, the Bay of Biloxi, the Bay of St. Louis,

and the Great Rigolet, but none on the Pearl River, and Congress reserved the power to amend or alter the act so as prevent or to remove material obstruction.

6. The defendant further avers and declares that the said bridge was made under the power and authority thereto granted by the United States and the States of Louisiana and Mississippi and Alabama; that the construction of said bridge has been costly, amounting to $20,000 and upwards; that the maintainance of a draw-bridge would entail a great cost, and that the corporation is authorized to maintain it under the act of Congress aforesaid, and that the same is a lawful structure and a post-road, and that so long as the same is thus authorized that it is not competent for the court to overturn it or abate it as illegal, or as a nuisance.

7. And the defendant further answers and declares that the
31 traffic through the pass of the Pearl River, mentioned in the petition, at and before the adoption of the acts aforesaid, and since that time, has been inconsiderable, and that the principal portion of the trade had gone to New Orleans and along the other passes of the said river, and that the prospect of another mode of access to the East and West from that section of the State was encouraged by the State, and since the adoption of the act of the legislature of the State of Mississippi, referred to in the petition and approved the 7th February, 1867, whereby the said company was relieved from the making of a draw-bridge over the eastern branches of the Pearl River, or the mouth of the same, and of the adoption of the act of Congress, being the act approved the second day of March, 1868, whereby and wherein the said bridges were recognized as lawful structures and a post-road of the United States, and the respondent pleads the terms of the acts *of* aforesaid, and the powers and faculties granted therein, as confirming a right upon the respondent to build and to maintain them.

Wherefore, the respondent prays judgment of the said petition, and that the prayer thereof be refused, and the same may be dismissed
32 without costs.

And the defendants files herewith a map of the coast as taken from the archives of the United States and as made by the officers of the Coast Survey, and a delineation of the track of the railroad and bridges, as part of this answer.

(Signed) J. A. CAMPBELL,
Of Counsel for Company.
R. SEAL,
Att'y for the Defendants.

(Marked:) Filed June 22nd, 1875.
(Signed) T. J. MURPHY,
Clerk.

(Herewith filed a copy of map.)

(Here follows map marked page 32.)

Be it remembered that on this day, that is to say, the 24 day of June, A. D. 1875, the following entry appears on the minutes of the circuit court of the county and State aforesaid, which entry is couched in the following words and figures, to wit:

STATE OF MISSISSIPPI,
Hancock County:

Special June term, A. D. 1875, of the circuit court of Hancock County.

Be it remembered that on this day, that is to say, on the 24th day of June, A. D. 1875, a special term of the circuit court of the 1st judicial circuit court, district of said county, was begun and held in said county at the court-house thereof in the city of Bay St. Louis, in the county and State aforesaid, that being the place designated by law for
33 holding of the same, for the purpose of trying the cause wherein the State of Mississippi, upon the petition of Daniel B. Seal, district attorney of said circuit court district, these plaintiffs, and the New Orleans, Mobile and Chattanooga Railroad Company are defendants, in accordance with the fiat of the judge of said circuit court of *of* the first judicial circuit court district, which fiat is as follows, to wit:

To the clerk of the circuit court of Hancock County, in the State of Mississippi:

Let a writ of mandamus issue as prayed for in the foregoing petition, returnable before me at the court-house of said county in the city of Bay St. Louis on the 24th day of June, A. D. 1875, on which day is ordered that said writ and cause shall be tried before me, in vacation, on that day and at that place.

(Signed) G. C. CHANDLER,
Judge 1st Circuit District.

34 There were present, to wit, honorable Green C. Chandler, judge of the first judicial circuit court district, sole presiding therein; D. B. Seal, district attorney of said district; Thomas J. Murphy, clerk of said court; John J. Saucier, sheriff of said county.

Be it remembered that on this day, that is to say, on the 24th day of June, A. D. 1875, the defendants, by their attorney, filed in said circuit court their petition and bond, praying for a transfer of said cause to the Federal circuit court, in the city of Jackson, in the State of Mississippi, which petition and bond is couched in the following words and figures, to wit:

35 To the honorable Green C. Chandler, of the cir t court for the first district, sitting in the county of Hancock, in the State of Mississippi:

The respectful petition of the New Orleans, Mobile and Chattanooga Railroad Company, a company incorporated by the State of Alabama on the 24th of November, 1866, and which exists in that State under the same act of incorporation, but by one of the amendatory acts has been permitted to use the name of the New Orleans, Mobile and Texas Railroad Company, being the same corporation, and which has been recognized in the act of the legislature of Mississippi, approved 7th February, 1867, relative to the said company respectfully represents:

That the said corporation, by the name used in the original statute and the statute of Mississippi, aforesaid, has been sued at a special court convened by your honor under provisions of an act, chapter 171, approved February 26th, 1875, at the instance of the district attorney, and in the name of the State of Mississippi, by a petition for a mandamus, the object of which is to obtain an order that your petitioners should establish a drawbridge instead of the bridge existing

over the eastern branch or pass of Pearl River, as it was built in 1869 and 1870, under the provisions of the act of the legislature of the State of Mississippi, aforesaid, and which has been used, possessed by the said corporation since the construction thereof, and that the said bridge should be abated or altered to meet some undefined impression of a more suitable bridge with a draw.

Your petitioner further represents that the object of the petition is of a civil nature, and that this suit is in the nature of a remedy for a civil cause, there being no presentment or indictment, and that the same in value to your petitioner is five thousand dollars and upwards.

Your petitioner further says that the right to erect and to maintain their present location of the bridge and the use of the same, and its maintainance for the conveyance of the cars, trains, passengers, mails and merchandize, is affirmed by the company as vesting on a contract with the State of Mississippi in the enactment aforesaid, and that the State of Mississippi has no power to repudiate that contract or to impair its obligations; that it is a vested right resting on a contract and supported and sustained by the Constitution of the United States, and that this cause is one arising under the Constitution of the United States.

And your petitioner further represents that the bridge aforesaid and its maintainance over the said river in the manner in which it exists is authorized by the act of Congress, approved March 2nd, 1868, which authorized and empowered the said company to construct, build, and maintain bridges over and across the navigable waters of the United States on the route of the said railroad between Mobile and New Orleans, and that when constructed they should be recognized as lawful structures and a post road, and were declared to be such; and the Congress reserved the power to alter the same when they become an obstruction to the navigable waters.

Your petitioner says that the railroad and bridges are and have been for three or more years a post road, and which the mail of the United States have been carried and are now being carried, and as the bridge referred to is a lawful structure under the laws of the United States, that this suit impugns the rights, privileges, and franchises granted by the act of Congress aforesaid of the 2nd March, 1868.

Your petitioner offers a bond with security in the sum of one thousand dollars conditioned for entering in the circuit court of the United States in the fifth circuit and for the southern district of Mississippi to be held the first Monday in November next, on the first day of the term, a copy of the record in such suit and for paying all the costs to be awarded in the said circuit court, if such court shall hold, if said court should hold that said removal of the said suit was improperly or wrongfully brought, and for filing special bail if required, and prays of this honorable court to make the order for the removal of this suit, pursuant to the act of Congress of the United States, approved 3rd March, 1875, being chapter 134, to the circuit court of the United States, at the said term there, to be disposed of under the jurisdiction and orders of the said court.

(Signed)

JNO. A. CAMPBELL,
Agent and Attorney of said Petition.

Before me, L. L. Davis, clerk of the circuit court for the county of Harrison, in the State of Mississippi, personally came D. B. Robinson, general superintendent and agent of the said

corporation in the petition mentioned, and on whom service was made of the writ or notice in the suit, who maketh oath and saith that this petition is true in substance and in the matter of facts as stated therein.

(Signed) D. B. ROBINSON.

Sworn and subscribed before me this 15th day of June, 1875.

(Signed) L. L. DAVIS, *Clerk.*

(Marked:) Filed June 24, 1875. (Signed) S. J. Murphy, clerk.

Copy of bond.

THE STATE OF MISSISSIPPI,
Hancock County:

Know all men by these presents that the New Orleans, Mobile and Chattanooga Railroad Company, otherwise New Orleans, Mobile and Texas Railroad Company, a corporation of the State of Alabama, as principal, and D. B. Robinson and , as sureties, are bound to the State of Mississippi in the penal sum of one thousand dollars to be paid to the said State, and for which payment truly to be made, we bind ourselves, executors, administrators, and assigns
40 by these presents, sealed with our seals and dated this day of June, 1875.

The condition of this obligation is such that whereas the said railroad corporation above named has been sued at a special term of the circuit court in Hancock County, held by the judge under the act of the legislature, chapter 171 of the acts of 1875, approved 26 February, 1875, at the suit of the State; and whereas the said railroad corporation has applied to the judge of the court to remove the cause to the circuit court of the United States for the southern district of Mississippi, according to the conditions of the act of Congress approved 3 March, 1875, chapter 137, and the order of removal has been made:

Now, if the said New Orleans, Mobile and Chattanooga Railroad Company, otherwise New Orleans, Mobile and Texas Railroad Company, shall enter in the circuit court of the United States to be held at Jackson for the southern district of Mississippi, on the first Monday of November next, on the first day of the term a copy of the record of this suit, and shall pay all costs that may be awarded by the said circ-
41 cuit court to the said State and all costs, if such court shall hold that the suit was wrongfully or improperly removed thereto, and shall appear and enter special bail if it were originally requisite therein, then this obligation shall be null and void; otherwise to have full force and virtue.

[SEAL.] (Signed) NEW ORLEANS, MOBILE, CHATTANOOGA OR TEXAS RAILROAD,
By D. B. ROBINSON, *Superintendent.*
D. B. ROBINSON. [SEAL.]
STEPHEN CALLEN. [SEAL.]

THE STATE OF MISSISSIPPI,
Harrison County:

Personally came and appeared before me, L. L. Davis, clerk of the circuit court of said county and State, D. B. Robinson and Stephen Callen, who, being by me first duly sworn, took and subscribed the following oath:

I, D. B. Robinson and Stephen Callen, do solemnly swear that worth the sum of one thousand dollars over and above all legal liabilities, and that have visible property to said amount subject to levy and sale under execution over and above all property exempted by law for sale for debt.

(Signed) D. B. ROBINSON.
STEPHEN CALLEN.

Sworn to and subscribed before me, and given under my hand
42 and seal of said court, this 15th day of June, A. D. 1875.

[L. S.] (Signed) L. L. DAVIS, *Clerk.*

(Marked:) Filed June 24th, 1875. (Signed) S. J. Murphy, clerk.

Be it remembered that on this day, that is to say, the 24th day of June, 1875, the following entry appears on the minutes of said court, which entry is couched in the following words and figures, to wit:

THE STATE OF MISSISSIPPI
vs.
NEW ORLEANS, MOBILE AND CHATTANOOGA Railroad Company. } Mandamus.

Now comes the defendants, by their attorney, and moves the court that this cause be transferred, as per petition on file, to the Federal circuit court in the city of Jackson in said State.

And after argument of counsel, the court being sufficiently advised in the premises, it is therefore considered by the court that said motion be overruled and said transfer be refused.

Be it remembered that on the day last aforesaid, that is to say, the 24th day of June, A. D. 1875, the defendants, by their attorney,
43 filed in said court their protest to the ruling and action of the court, which protest is couched in the following words and figures, to wit:

THE STATE OF MISSISSIPPI,
Hancock County:

Circuit court begun and held in vacation before Green C. Chandler, judge of the circuit court for the first district of the State of Mississippi under an act entitled "An act to secure a more speedy trial of the writs of mandamus and prohibition in certain cases," approved February 26, 1875.

THE STATE OF MISSISSIPPI ON RELATION of D. B. Seal, district attorney,
vs.
THE NEW ORLEANS, MOBILE AND TEXAS Railroad.

Be it remembered that heretofore on this day, the 24 day of June, 1875, that the defendants filed a petition and tendered a bond under an act of the Congress of the United States entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," approved March 3, 1875, which said petition and affidavit attached to the

corporation in the petition mentioned, and on whom service was made of the writ or notice in the suit, who maketh oath and saith that this petition is true in substance and in the matter of facts as stated therein.

(Signed) D. B. ROBINSON.

Sworn and subscribed before me this 15th day of June, 1875.

(Signed) L. L. DAVIS, *Clerk.*

(Marked:) Filed June 24, 1875. (Signed) S. J. Murphy, clerk.

Copy of bond.

THE STATE OF MISSISSIPPI,
Hancock County:

Know all men by these presents that the New Orleans, Mobile and Chattanooga Railroad Company, otherwise New Orleans, Mobile and Texas Railroad Company, a corporation of the State of Alabama, as principal, and D. B. Robinson and , as sureties, are bound to the State of Mississippi in the penal sum of one thousand dollars to be paid to the said State, and for which payment truly to be made, we bind ourselves, executors, administrators, and assigns
40 by these presents, sealed with our seals and dated this day of June, 1875.

The condition of this obligation is such that whereas the said railroad corporation above named has been sued at a special term of the circuit court in Hancock County, held by the judge under the act of the legislature, chapter 171 of the acts of 1875, approved 26 February, 1875, at the suit of the State; and whereas the said railroad corporation has applied to the judge of the court to remove the cause to the circuit court of the United States for the southern district of Mississippi, according to the conditions of the act of Congress approved 3 March, 1875, chapter 137, and the order of removal has been made:

Now, if the said New Orleans, Mobile and Chattanooga Railroad Company, otherwise New Orleans, Mobile and Texas Railroad Company, shall enter in the circuit court of the United States to be held at Jackson for the southern district of Mississippi, on the first Monday of November next, on the first day of the term a copy of the record of this suit, and shall pay all costs that may be awarded by the said circ-
41 cuit court to the said State and all costs, if such court shall hold that the suit was wrongfully or improperly removed thereto, and shall appear and enter special bail if it were originally requisite therein, then this obligation shall be null and void; otherwise to have full force and virtue.

[SEAL.] (Signed) NEW ORLEANS, MOBILE, CHATTANOOGA OR TEXAS RAILROAD,
By D. B. ROBINSON, *Superintendent.*
D. B. ROBINSON. [SEAL.]
STEPHEN CALLEN. [SEAL.]

THE STATE OF MISSISSIPPI,
Harrison County:

Personally came and appeared before me, L. L. Davis, clerk of the circuit court of said county and State, D. B. Robinson and Stephen Callen, who, being by me first duly sworn, took and subscribed the following oath:

I, D. B. Robinson and Stephen Callen, do solemnly swear that worth the sum of one thousand dollars over and above all legal liabilities, and that have visible property to said amount subject to levy and sale under execution over and above all property exempted by law for sale for debt.

(Signed) D. B. ROBINSON.
STEPHEN CALLEN.

Sworn to and subscribed before me, and given under my hand
42 and seal of said court, this 15th day of June, A. D. 1875.

[L. S.] (Signed) L. L. DAVIS, *Clerk.*

(Marked:) Filed June 24th, 1875. (Signed) S. J. Murphy, clerk.

Be it remembered that on this day, that is to say, the 24th day of June, 1875, the following entry appears on the minutes of said court, which entry is couched in the following words and figures, to wit:

THE STATE OF MISSISSIPPI
vs.
NEW ORLEANS, MOBILE AND CHATTANOOGA Railroad Company. } Mandamus.

Now comes the defendants, by their attorney, and moves the court that this cause be transferred, as per petition on file, to the Federal circuit court in the city of Jackson in said State.

And after argument of counsel, the court being sufficiently advised in the premises, it is therefore considered by the court that said motion be overruled and said transfer be refused.

Be it remembered that on the day last aforesaid, that is to say, the 24th day of June, A. D. 1875, the defendants, by their attorney,
43 filed in said court their protest to the ruling and action of the court, which protest is couched in the following words and figures, to wit:

THE STATE OF MISSISSIPPI,
Hancock County:

Circuit court begun and held in vacation before Green C. Chandler, judge of the circuit court for the first district of the State of Mississippi under an act entitled "An act to secure a more speedy trial of the writs of mandamus and prohibition in certain cases," approved February 26, 1875.

THE STATE OF MISSISSIPPI ON RELATION of D. B. Seal, district attorney,
vs.
THE NEW ORLEANS, MOBILE AND TEXAS Railroad.

Be it remembered that heretofore on this day, the 24 day of June, 1875, that the defendants filed a petition and tendered a bond under an act of the Congress of the United States entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," approved March 3, 1875, which said petition and affidavit attached to the

same, and the said bond, are couched in the words and figures following, to wit:

44 To the honorable Green C. Chandler, the judge of the circuit court for the first district, sitting in the county of Hancock, in the State of Mississippi:

The respectful petition of the New Orleans, Mobile and Chattanooga Railroad Company, a company incorporated by the State of Alabama on the 24th of November, 1866, and which exists in that State under the same act of incorporation, but by one of the amendatory acts has been permitted to use the name of the New Orleans, Mobile and Texas Railroad Company, being the same corporation and which has been recognized in the act of the legislature of Mississippi approved 7th February, 1867, relative to the said company, respectfully that the said corporation, by the name used in the original statute and the statute of Mississippi aforesaid, has been sued at a special court convened by your honor under the provision of an act, chapter 171, approved 26th of February, 1875, at the instance of the district attorney and in the name of the State of Mississippi, by a petition for a mandamus, the object
45 of which is to obtain an order that your petitioners should establish a drawbridge instead of the bridge now existing over the eastern branch or pass of the Pearl River, as it was built in the years 1869 and 1870, under the provisions of the act of the legislature of the State of Mississippi aforesaid, and which has been used and possessed by the said corporation since the construction thereof, and that the said bridge should be abated or altered to meet some undefined impression of a more suitable bridge with a draw.

Your petitioner further represents that the object of the petition is of a civil nature, and that this suit is in the nature of a remedy for a civil cause, there being no presentment or indictment, and that the sum involved to your petitioner is five thousand dollars and upwards.

Your petitioner further says that the right to erect and maintain the present location of the bridge and the use of the same and its maintainance for the conveyance of the cars, trains, passengers, mail, and merchandise is affirmed by the company as resting on a contract with the State of Mississippi in the enactment aforesaid, and that the State
46 of Mississippi has no power to repudiate that contract or to impair its obligations; that it is a vested right vesting on a contract and supported and sustained by the Constitution of the United States, and that this cause is one arising under the Constitution of the United States.

And your petitioner further represents that the bridge aforesaid and its maintainance over the said river in the manner in which it exists is authorized by the act of Congress approved March 2nd, 1868, which authorized and empowered the said company to construct, build, and maintain bridges over and across the navigable waters of the United States on the route of the said railroad between Mobile and New Orleans, and that when constructed they should be recognized as lawful structures and a postroad, and were declared to be such; and the Congress reserved the power to alter the same when they become an obstruction to the navigable waters.

Your petitioner says that the railroad and bridges are and have been for three or more years a postroad over which the mail of the
47 United States have been carried and are now being carried, and the bridge referred to is a lawful structure under the laws of the

United States; that this suit impugns the right, privilege, and franchise granted by the act of Congress aforesaid of the 2 March, 1868.

Your petitioner offers a bond with security in the sum of one thousand dollars conditioned for entering in the circuit court of the United States in the fifth circuit and for the southern district of Mississippi, to be held the first Monday of November next, on the first day of the term, a copy of the record in such suit and for paying all the costs to be awarded in the said circuit court, if such court shall hold, if said court should hold that such removal of the said suit was improperly or wrongfully brought, and for filing special bail if required, and prays of this honorable court to make the order for the removal of this suit pursuant to the act of Congress of the United States approved 3rd March, 1875, being chapter 137, to the circuit court of the United States at the
48 said term, then to be disposed under the jurisdiction and orders of the said court.

(Signed) JOHN A. CAMPBELL,
Agent and Attorney of said Petitioner.

Before me, L. L. Davis, clerk of the circuit court for the county of Harrison, in the State of Mississippi, personally came D. B. Robinson, general superintendent and agent of the said corporation, in the petition mentioned, and on whom service was made of the writ or notice in the suit, who maketh oath and saith that this petition is true in substance and in the matters of fact as stated therein.

(Signed) D. B. ROBINSON.

Sworn and subscribed before me this 15th day of June, 1875.

(Signed) L. L DAVIS,
Clerk.

(Marked:) Filed June 24th, 1875. (Signed) S. J. Murphy, clerk.

THE STATE OF MISSISSIPPI,
Hancock County:

Know all men by these presents that the New Orleans, Mobile and Chattanooga Railroad Company, otherwise New Orleans, Mobile and Texas Railroad Company, a corporation of the State of Alabama, as principal, and D. B. Robinson and , as securities, are bound to the State of Mississippi in the penal sum of one thousand dollars
49 to be paid to the said State, and for which payment truly to be made we bind ourselves, executors, and administrators, and assigns by these present', sealed with our seal and dated this day of June, 1875.

The condition of this obligation is such that whereas the said railroad corporation above named has been sued at a special term of the circuit court in Hancock County, held by the judge under the act of the legislature, chapter 171 of the acts of 1875, approved 26 February, 1875, at the suit of the State; and whereas the said railroad corporation has applied to the judge of the court to remove the cause to the circuit court of the United States for the southern district of Mississippi, according to the conditions of the act of Congress, approved 3rd March, 1875, chapter 137, and the order of removal has been made:

Now, if the said New Orleans, Mobile and Chattanooga Railroad Company, otherwise New Orleans, Mobile and Texas Railroad Company, shall enter in the circuit court of the United States to be held at Jackson, for the southern district of Mississippi, on the first Monday
50 of November next, on the first day of the term, a copy of the record

of this suit, and shall pay all costs that may be awarded by the said circuit court to the said State, and all costs, if such court shall hold that the said suit was wrongfully or improperly removed thereto, and shall appear and enter special bail if it was originally requisite therein, then this obligation shall be null and void; otherwise to have full force and virtue.

[SEAL.] (Signed) NEW ORLEANS, MOBILE, CHATTANOOGA OR TEXAS RAILROAD,
By D. B. ROBINSON,
Superintendent.
D. B. ROBINSON. [SEAL.]
STEPHEN CALLEN. [SEAL.]

THE STATE OF MISSISSIPPI,
Harrison County:

Personally appeared before me L. L. Davis, clerk of the circuit court of said county and said State, D. B. Robinson and Stephen Callen, who, being by me first duly sworn, took and subscribed the following oath:

I, D. B. Robinson and Stephen Callen, do solemnly swear that I worth the sum of one thousand dollars over and above all legal liabilities, and that have visible property to said amount subject to
51 levy and sale under execution over and above all property exempted by law from sale for debt.

(Signed) D. B. ROBINSON.
STEPHEN CALLEN.

Sworn to and subscribed before me, and given under my hand and seal of said court, this the 15th day of June, A. D. 1875.

[L. S.] (Signed) L. L. DAVIS,
Clerk.

(Marked:) Filed June 24th, 1875. (Signed) T. J. Murphy, cl'k.

The court overruled the application for removal, and decided to proceed to the trial of said case, and before the trial was had the defendant objected and protested against the trial of said case before said judge in vacation, upon the ground that he had no jurisdiction, but should remove said case as prayed for, and waives no right.

The court overruled said objection and protest, and proceeded to the trial of said case.

Defendants pray that his objection and protest be made a part of the record in this case, which is accordingly done.

Witness my hand and seal on the 24th day of June, 1875.

(Signed) [SEAL.] G. C. CHANDLER,
Judge.

(Marked:) Filed June 24th, 1875. (Signed) T. J. Murphy, clerk.

52 Be it remembered that on this day, that is to say, 25th day of June, A. D. 1875, the plaintiff, by her attorney, filed in said court her demurrer to the defendant's answer to the petition, which demurrer is couched in the following words and figures, to wit:

THE STATE OF MISSISSIPPI, BY D. B. SEAL, dist. att'y,
vs.
NEW ORLEANS, MOBILE AND CHATTANOOGA Railroad Company.

Now comes the said plaintiff and says that the matters and things

set forth and stated in defendant's answer is not sufficient in law from precluding the plaintiff from holding and maintaining their action, and demur thereto, and for special causes of demurrer says:

First. That no sufficient cause is shown why the mandamus should not issue.

Second. Because no matter of fact is alleged, but only matters of law.

Third. Because of other irregularities and deficiencies in said answer, and because the same does not deny the facts as alleged.

(Signed) SEAL & CHAMPLIN,
For Demurrer.

(Marked:) Filed June 25th, 1875. (Signed) T. J. Murphy, clerk.

53 Be it remembered that on the day last aforesaid, that is to say, on the 25th day of June, A. D. 1875, the following order was entered on the minutes of said court, which order is couched in the following words and figures, to wit:

THE STATE OF MISSISSIPPI, BY D. B. SEAL, dist. attorney, *vs.* NEW ORLEANS, MOBILE AND CHATTANOOGA Railroad Co. } Mandamus.

This cause coming on to be heard this day upon the plaintiff's demurrer to the defendant's answer, and after argument, and the court being now sufficiently advised in the premises, it is considered that the plaintiff's demurrer be and the same is sustained, and that the defendant's declining to answer further, it is ordered, adjudged, and decreed that a *pre*-em'tory mandamus issue out of and under the seal of this court directed to the said New Orleans, Mobile and Chattanooga Railroad Company, and to the president and directors thereof, directing and commanding said company to abate the nuisance and obstruction of the bridge across Pearl River, on the line between the State of
54 Louisiana and Mississippi, and to construct and maintain in the central portion of the channel of Pearl River, where railroad crosses the same, a draw-bridge which, when open, shall give a clear space for the passage of vessels of not less than sixty feet in width, and after the construction of the said draw-bridge at all times provide that said draw-bridge shall be opened for the passage for any and all vessels seeking to pass through the same without unnecessary delay, and that plaintiff recover his costs in this case, to be taxed by the clerk of this court, and that execution issue as required by law.

And if the said railroad company shall fail to comply and obey said writ of mandamus within 90 days from date, then let a writ of attachment issue, as required by the statute, against the said railroad company, its president, directors and agents, returnable forthwith.

Whereupon, on the day last aforesaid, that is to say, the 25th day of June, A. D. 1875, the defendants, by their attorney, filed in said court their petition praying for an appeal to the supreme court of the State of Mississippi, which petition is couched in the following words and figures, to wit:

THE STATE OF MISSISSIPPI,
Hancock County:

Special June term.

55 THE STATE OF MISSISSIPPI, ON RELATION of D. B. Seal, district attorney,
vs.
THE NEW ORLEANS, MOBILE AND TEXAS Railroad Company.

The defendants beg leave to state to the judge and to the clerk of the circuit court, that there is manifest error in the proceedings and judgement had in the above cause, and now assigns the following:

First. That the petition sets out no ground or reason for the issuance of the writ of mandamus in this case.

Second. Because there is error in the judgment rendered in the case upon the demurrer filed to the answer and the final judgment rendered upon said cause, and the said defendant now prays an appeal from said judgment and decision of the judge trying this case, in vacation, to the supreme court of the State of Mississippi, where the judgment and decision can be reviewed, reversed, and for naught held.

(Signed) R. SEAL,
For Defendants.

Filed June 25th, 1875.
(Signed) T. J. MURPHY, *Clerk.*

56 Be it remembered, that on the day last aforesaid, that is to say, on the 25th of June, A. D. 1875, the defendants, by their attorney, filed in said court their appeal-bond, which appeal-bond is couched in the following words and figures, to wit:

THE STATE OF MISSISSIPPI,
Hancock County:

Know all men by these presents, that the New Orleans, Mobile and Texas Railroad Company and D. B. Robinson and J. V. Toulme, are held and firmly bound unto the State of Mississippi in the just and full sum of five hundred dollars, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators and successors in office, jointly and firmly and severally by these presents, signed, sealed, and delivered by us on the 25 day of June, 1875.

The condition of the above obligation is such that, whereas Green C. Chandler, judge of the circuit court for the first district of the State of Mississippi, under an act of the legislature of the State of Mississippi, entitled "An act to secure a more speedy trial of the writs of mandamus and prohibition in certain cases," approved February 26, 1875, convened his court in vacation, to be held at the Bay St. Louis, in said county and State, on the 24th day of June, 1875, for the trial of
57 the writ of mandamus issued in this case. The court, after hearing said cause, made the following order and decision, to wit:

"That the demurrer to the answer of the defendants be sustained, and that further ordered and decreed, that a *pre*-em'tory mandamus issue out of and from under the seal of this court, commanding the defendants to abate the nuisance and obstruction of the bridge across Pearl River, and to construct a draw-bridge and to pay all costs."

The defendant prayed and obtained an appeal from said decision to the supreme court of the State of Mississippi.

And if the said defendant, the New Orleans, Mobile and Texas Railroad Company, shall prosecute said appeal to effect, or in case of failure, for the payment or performance of the judgment, decree, or sentance of the supreme court of the State of Mississippi, then this obligation to be void; else to remain in full force and effect.

[SEAL.] (Signed) NEW ORLEANS, MOBILE AND CHATTANOOGA OR TEXAS RAILROAD.

By D. B. ROBINSON, *Sup't.* [SEAL.]
D. B. ROBINSON. [SEAL.]
JOHN V. TOULME. [SEAL.]

THE STATE OF MISSISSIPPI,
Hancock County:

58 Personally came and appeared before me, T. J. Murphy, clerk of the circuit court of said county and State, D. B. Robinson and John V. Toulme, who, being by me first duly sworn, took and subscribed the following oath:

I, D. B. Robinson and John V. Toulme, do solemnly swear that I am worth the sum of five hundred dollars over and above all legal liabilities and that we have visible property to said amount subject to levy, and sale under execution, over and above all property exempted by law from sale debt.

(Signed) D. B. ROBINSON.
JOHN V. TOULME.

Sworn to and subscribed before me this the 25th day of June, 1875.

(Signed) T. J. MURPHY, *Clk.*

The foregoing bond and security approved by me this the 25th day of June, 1875.

(Signed) T. J. MURPHY, *Clerk.*

(Marked:) Filed June 25th, 1875. Signed, T. J. Murphy, clerk.

Be it remembered, that on the day last aforesaid, that is to say, on the 25th day of June, A. D. 1875, among the orders and entries made at the above-stated term on the minutes of said court, there was one in the following words and figures, to wit:

59 THE STATE OF MISSISSIPPI, ON RELATION of D. B. Seal, dist. attorney,
vs.
THE NEW ORLEANS, MOBILE AND TEXAS RAILROAD Company. } Mandamus.

The defendants prayed and obtained an appeal from the decision of the said judge trying the writ of mandamus in the above to the supreme court of the State of Mississippi, on giving bond in the sum of five hundred dollars, conditioned as required by law, with D. B. Robinson and John V. Toulme security, which bond and security was given in open court and approved, and to operate as a supersedeas to the judgment in this case.

(Signed) G. C. CHANDLER, *Judge.*

THE STATE OF MISSISSIPPI,
Hancock County:

To the sheriff of Hancock County, greeting.

You are hereby commanded to cite D. B. Seal, district attorney of the first judicial district of said State, to be and appear before our said supreme court of the State of Mississippi, at a term thereof to be held in the court-room of said court in the capitol at the city of Jack-
60 son, in said State, instanter to answer and defend a writ of error filed in said court by the New Orleans, Mobile and Chattanooga Railroad Company, if to you the said D. B. Seal, district attorney of the first judicial district of said State, it shall seem expedient.

Witness the honorable Green C. Chandler, judge of the 1st judicial district of the State of Mississippi, the 1st Monday of May, A. D. 1875.

Issued the 14th day of July, A. D. 1875.

[L. S.] T. J. MURPHY, *Clerk.*

Whereupon, on the return thereof, that is to say, on the 14th day of July, A. D. 1875, the sheriff made his returns on said writ, which returns are couched in the following words and figures, to wit:

Received in office this the 14th day of July, A. D. 1875, and duly executed the same, the same day by personal service and delivering to D. B. Seal, district attorney, a true copy of same.

(Signed) JNO. J. SAUCIER, *Sheriff.*

THE STATE OF MISSISSIPPI,
Hancock County:

I, Thomas J. Murphy, clerk of the circuit court of said county, do hereby certify that the foregoing 40 pages contains a true copy of all the pro-
61 ceedings and papers and map in the case wherein the State of Mississippi, upon the petition of D. B. Seal, district attorney, is plaintiff, and the New Orleans, Mobile and Chattanooga Railroad Company are defendants, as the same appears to us of record from the original papers now on file and of record in my office.

Given under my hand and seal of office this the 19th day of July, A. D. 1875.

T. J. MURPHY, *Clerk.*

62 *Opinion.*

N. O. M. & C. R. R. Co.
vs.
THE STATE OF MISSISSIPPI.

The refusal of the circuit judge to remove this cause to the circuit court of the U. S. for the southern district of Mississippi, on the application of plaintiff in error, was correct, because the case is not such an one as by the 2d section of the act of Congress approved March 3, 1875, to regulate the removal of causes from State courts is removable.

The demurrer to the petition for mandamus was properly sustained. The answer presents the whole case of the company, and calls for the interpretation of the act of the legislature to determine whether it requires the construction of a draw-bridge over the channel of Pearl River. It is manifest that the intent of the legislature in the act referred to was to require the construction of a draw-bridge in the central portion of the channel of Pearl River or on the Louisiana side of the stream, if the con-

sent of that State should be obtained to that. The proviso, "That in case the company shall locate the line of their road across the channel
63 of the Rigolet at a point south or below the principal entrance of Pearl River into the Rigolet, then the said company shall not be required to construct a draw-bridge across any bayou leading into Pearl Rriver or across any small pass or mouth of said river," was not intended to have the effect to permit a solid bridge without a draw across the channel of the Pearl River, above the point of its emptying into Lake Borgne. The purpose to prevent the obstruction to the navigation of Pearl River is manifest throughout the act.

The proviso above recited has the effect to relieve from making a draw-bridge on the condition specified "across any bayou leading into Pearl River or across any small pass or mouth of said river," but was not intended to relieve from the necessity of a drawbridge across the main channel of Pearl River where it is the boundary between the States of Mississippi and Louisiana. The maps show that Pearl River may be entered from Lake Borgne and from the Rigolets. The main channel seems to be that emptying into Lake Borgne, and constituting the boundary between Mississippi and Louisiana. The entrance from
64 the Rigolets through the territory of Louisiana, but Mississippi as well as Louisiana is interested in the navigation of the river Pearl through all its connections with the Gulf of Mexico or adjacent waters, and in consenting to the construction of the road of this company through her territories, the State of Mississippi gave her consent on the terms prescribed by the act.

It is first provided "that said company shall preserve any water course * * * which its said railroad may pass upon, along, intersect, touch or cross, so as not to impair its usefulness to the public." Then is the specific provision for a draw-bridge in the central portion of the channel of the Pearl River and other waters of Mississippi. Then follows the proviso above copied intended to relieve from the necessity of constructing and maintaining a draw-bridge across any mere bayou leading into Pearl River or across any small pass or (small) mouth of said river, if the line of the railroad should be constructed across the channel of the Rigolets below the principal entrance of Pearl River into the Rigolet. The act has reference to both the channels through
65 which Pearl River communicates with the waters of the lakes.

A draw-bridge is absolutely required across the channel of Pearl, where it divides Mississippi and Louisiana. One is not required across any bayou or small pass or mouth of said river, if the line is located across the Rigolet below the principal entrance of Pearl River into the Rigolet. The act of Congress approved March 2, 1868, entitled "An act to establish and declare the railroad and bridges of the New Orleans, Mobile and Chattanooga Railroad Company, as hereafter constructed, a *a* post road, and for other purposes," authorizes the company to construct bridges across the navigable waters of the United States; and provides that "said railroad and its bridges aforesaid, when constructed, completed, and in use in accordance with this act, and the laws of the several States through whose territory the same shall pass, shall be deemed, recognized, and known as lawful structures and a post road. The case turns entirely upon the construction of the act of the legislature of Mississippi, and in this opinion we have announced what we regard as its proper construction.

The judgment of the circuit judge in awarding a peremptory mandamus is affirmed.

CAMPBELL.

66 THE STATE OF MISSISSIPPI,
Hinds County, ss:

I, Alonzo W. Little, clerk of the supreme court of Mississippi, do hereby certify that the above and foregoing (53) fifty-three pages contain a true and perfect copy of the transcript of the record in case of No. 1756, New Orleans, Mobile & Chattanooga Railroad Company against The State of Mississippi, &c., on writ of error to the supreme court of Miss., from the circuit court of Hancock, and filed in said supreme court on the 20th July, 1875. Also a true and perfect copy of the opinion of said supreme court of Miss., rendered in said cause on the 17th July, 1876, as the same now appears of record in my office.

Given under my hand and seal of office at Jackson, this 7th day of October, A. D. 1876.

[SEAL.] A. W. LITTLE, *Clk.*

(Indorsement on cover:) No. 282. The New Orleans, Mobile and Texas Railroad Co., pl'ff in error, vs. The State of Mississippi. Mississippi sup. court. Filed 12th October, 1877.

OFFICE SUPREME COURT U. S.
FILED
MAR 15 1880
D. W. MIDDLETON, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 282.

NEW ORLEANS, MOBILE & TEXAS RAILROAD CO.

VS.

THE STATE OF MISSISSIPPI.

From the Supreme Court of Mississippi.

MATTERS OF FACT.

Clark & Hofeline, Brief Printers, 112 Gravier Street.

Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 282.

NEW ORLEANS, MOBILE & TEXAS RAILROAD CO.

VS.

THE STATE OF MISSISSIPPI.

From the Supreme Court of Mississippi.

MATTERS OF FACT.

The New Orleans, Mobile and Chattanooga Railroad Company, in whose name "Texas" has been substituted for "Chattanooga," with legislative authority, was incorporated in Alabama, in November, 1866, and was empowered to make a railroad from Mobile, through Alabama, Mississippi and Louisiana, to New Orleans.

In February, 1867, this charter was approved and the corporation recognized and allowed to exercise all of its faculties in Mississippi; and in August, 1868, in an act of that date and other acts subsequently passed, the charter was approved, adopted and permission was granted to construct and own the railroad in Louisiana to New Orleans.

The railroad was completed between the cities in the year 1870, and has been in operation since.

In the month of February, 1875, the legislature of Mississippi passed an act to secure a more speedy trial of writs of mandamus and prohibition. Ch. 171, p. 271, Acts. This allowed any petitioner to have a called session of a Circuit Court for the trial of the cause. The District Attorney, in June, 1875, filed a petition under this act for a writ of mandamus directed to the defendant to abate the bridge over the Pearl river, or to make an opening by means of a draw bridge sixty feet in width. A special court was convened in Hancock county, for the trial of this suit.

The petition complains that the defendant, a corporation of Alabama, had constructed the railroad and had constructed the bridge complained of. This bridge it is alleged was not warranted by law and obstructed the navigation of the river and was a public nuisance. The petition is made by the district attorney, and he proceeds in the name of the State.

The defendant appeared and filed an answer, from which it appears that the State of Mississippi, in the act of February, 1867, had authorized the building of the railroad across Pearl river and the construction of a bridge, and that if the corporation constructed a bridge across the Rigolets below the mouth of Pearl river entering into that sound, that no drawbridge should be required over any other mouth of that river. It also appeared that the United States, by an act of Congress, had authorized the passage of the river by bridges, and had declared that the railroad and bridges should be deemed lawful structures and a postroad.

Upon filing the answer, the defendant petitioned for a removal of the suit to the Circuit Court of the United States, for the Southern district of Mississippi, and offered a satisfactory bond, and showed that the suit was of a civil nature, that the defendant was a corporation of Alabama, and that by reason of the contract between the State and the corporation relative to the railroad, and the adoption of the railroad and bridge as a public highway and as a postroad of the United States, a case arose under the constitution and laws of the United States, and might be removed to the Circuit Court of the United States under the act of March, 1875.

The Court overruled this motion and proceeded to try the cause, against the opposition and objection of the defendant.

The Court sustained a demurrer to the answer, and entered a judgment according to the prayer of the petition—Rec. 19; an appeal was taken to the Supreme Court of the State, and there was an affirmance of the judgment of the Circuit Court of Hancock county—Rec. 22-23.

That judgment is the subject of the complaint of the railroad corporation in this Court.

II.

THE PLEADINGS, EVIDENCE AND JUDGMENT.

The petition for a mandamus is filed by the district attorney in the name of the State. The affidavit to

obtain a speedy trial, under the act of February, was made by him.

The charge in the petition is that the drawbridge which the petitioner alleges was exacted by the acts of incorporation in Mississippi and Louisiana, was not made in conformity to those acts. The petition sets forth that the bridge is made across the Pearl river, separating Mississippi and Louisiana, about a mile from the mouth of the river, as it enters Lake Borgne, and that there is no draw-bridge, and insists that the river is navigable and has been obstructed. The eastern limit of Louisiana, as established by Act of Congress, approved 14th April, 1812, and as now existing, is a line through the Lakes Maurepas and Pontchartrain, to the eastern mouth of Pearl river; thence up the eastern branch of Pearl river to the thirty-first degree of north latitude. 2 Statutes at large, p. 708.

The western limit of Mississippi on the Gulf of Mexico is the eastern line of Louisiana, and as established in the act, enabling the territory to form a State, approved 1st March, 1817, and is described as commencing on the Gulf at the line of Alabama, "thence westwardly, including all the islands within six leagues of the shore to the most eastern junction of Pearl river with Lake Borgne; thence up that river," etc., etc. 3 Statutes at large, p. 348. The position of the bridge then is readily ascertained.

The question is placed by the petition upon the conditions in the legislative acts.

The answer of the defendant pleads the authority of the State of MISSISSIPPI and of the State of LOUISIANA, and of the CONGRESS of the UNITED STATES to establish the bridge, and that it has been used since the years 1869–70, without molestation from any one as a lawful structure and a post-road, and that any alteration of the structure would be costly, and that no benefit would enure to any one.

A statement of these acts may be conveniently made here, as they are alluded to in the answer, and it is necessary to an intelligent discussion they be understood.

First. It is agreed that the bridge is across the eastern branch of Pearl river, near the mouth of that river before it disembogues into Lake Borgne. It is also agreed and stated in the opinion of the Supreme Court of the State, that there is another branch of the river, and this enters into the Rigolets—the outlet of Lake Pontchartrain—connecting that lake with the Mississippi Sound, of which Lake Borgne is the western portion, and is separated from the Gulf of Mexico by small sand islands or banks with divisions between them, and through which the interior waters are accessible.

It will be seen that the Rigolets and all the passes, bayous, lakes and inlets west of the eastern mouth of Pearl river are in Louisiana, and one-half of that eastern pass is in Louisiana. The sixth sub-section of Article II of the Act of Mississippi, approved 7th

February, 1867, contains a grant of full and unqualified authority to construct and maintain its railroad over all watercourses, bays, inlets, rivers and canals in the State in its course *by bridges* subject to two provisos.

I quote what relates to Pearl river: "Provided that in the central portion of the channel of the Pearl river * * said company shall construct and maintain a draw-bridge which when open shall give a clear space for the passage of vessels of not less than sixty feet in width"—and immediately there follows the second proviso; "that *in case the company shall locate the line of their railroad across the channel of the Rigolet at a point south or below the principal entrance of Pearl river into the Rigolet*, THEN the said company shall not be required to construct a draw-bridge across any bayou, leading into Pearl river, or across any small pass or mouth of said river."

The Louisiana Statute is nearly identical with the Mississippi Statute, the eighth sub-section of Article II corresponding to the sixth sub-section of the same article in the Mississippi Act. The terms of unlimited grant of faculty to construct and maintain a railroad with bridges over the waters, watercourses, rivers, lakes, bays, inlets and canals, are retained.

The company is empowered to maintain its railroad across the waters of Louisiana, known as Chef Menteur, Little Rigolet, Great Rigolet, and part of Lake Pontchartrain and other bayous, and streams between

Lake Pontchartrain and Pearl river, by bridges. There follows here two provisos: there shall be a draw-bridge over the Rigolets or the part of Lake Pontchartrain of a specified dimension; "and in the channel of the Pearl river, the said company shall construct and maintain a draw-bridge which when open, shall give a clear space for the passage of vessels of not less than sixty feet in width."

There is immediately after, "except in case the company shall locate their road across the Great Rigolet, at a point south of (or below) the principal entrance of Pearl river into the Great Rigolet, *then* the company shall only be required to construct one draw-bridge which shall be in the channel of the Great Rigolet as hereinbefore named."

The Supreme Court of Mississippi does not seem to appreciate the fact that on this subject the jurisdiction of that State commenced and terminated with the eastern bank of the eastern Pearl river and the middle of the stream; the remainder of the stream and all that is west is within Louisiana. The second proviso in the Mississippi Act has nothing to operate upon but that eastern mouth of the Pearl river. Up to that Louisiana has exercised jurisdiction by the act quoted above.

In the presence of all of the streams mentioned in these acts, Pearl river is insignificant. The commerce of that river was engrossed by New Orleans, and the only subject of interest was to maintain a free connection with the Rigolets.

Through the Rigolets the interstate commerce as well as the small commerce with the West Indies came into this country. No objection was made to the bridge over the Pearl river, while the company was constructing it. The Act of Louisiana provided that the bridge over Pearl river should be made unless the outlet through the Rigolets was maintained without obstruction. The Act in Louisiana was passed in 1868, its government having been superseded in 1867, before action could be taken in that year. In 1868, the Act of Congress of the 2d March, 1868, was approved to establish and declare the railroad and bridges of this corporation as thereafter constructed a post road, and for other purposes. 15 Statutes at large, Ch. 15, p. 38. This act authorized and empowered the company to construct and maintain its railroad over and across the navigable waters of the United States, on the route of said railroad, between New Orleans and Mobile, for the use of said company, and the passage of its engines, cars, trains of cars, passengers, mails and merchandise thereon; and the said railroad and its bridges aforesaid when constructed, completed, and in use, *according to this act* and the laws of the several States through whose territory the same shall pass, shall be deemed, recognized and known as lawful structures and a post road, and are hereby declared as such. This act prescribes the construction of draw-bridges over the Pascagoula river; the bay of Biloxi; the bay of St. Louis; and the Great Rigolet; and that these

shall be kept open, and the company shall provide facilities for the passage of all vessels. No mention is made of a bridge over the Pearl river, for the reason, probably, that the location before that time had been made of the bridge over the Great Rigolet, below the junction of the Pearl river with that strait.

The bridge over the Pearl river was located, constructed, maintained and used until 1875, when some personal or local enmity was excited, which provoked this suit. The interest involved to the community about Pearl river, if that name can be applied to the sparse population of that sterile region, is inconsiderable.

ASSIGNMENTS OF ERROR.

1. The plaintiff assigns for error the sanction of the Supreme Court of Mississippi to the judgment of the Court of Hancock county, refusing an order to remove the cause to the Circuit Court of the United States for the Southern District of Mississippi, as applied for by the defendant in the Circuit Court of Hancock county, as shown by the record. Rec. 15, 16, 17.

The cause is one of a civil nature; the proper bond was offered to the court; the defendant was a corporation domiciliated in Alabama, and organized by a law of that State.

2. The defendant claimed a right and authority to construct and to maintain the bridge under the Act of Congress, cited in the answer to the petition of the plaintiff, and in a petition for a removal.

A bill of exceptions was reserved, and the defendant went to trial under a protest.

Second. The plaintiff assigns for error, the sanction of the Supreme Court of Mississippi, to the judgment of the Circuit Court sustaining a demurrer to the answer, and giving a judgment that the bridge was not a lawful structure, and must be destroyed or reconstructed, as the judgment requires. Record, 19, 22, 23. The plaintiff avers that the structure was legally constructed according to the Acts of the Legislatures of Mississippi and of Louisiana, and of the Act of Congress, and the judgment to the contrary, is erroneous.

Because of the errors in this judgment, the plaintiff prays it may be annulled, and that the plaintiff have judgment for costs.

POINTS AND AUTHORITIES.

The petitioner in this case is the District Attorney, a citizen of the State of Mississippi, the defendant in the suit is a corporation of Alabama, as shown by the petition itself.

The suit is a civil suit to enforce a specific performance of a duty imposed upon the corporation, as the petition charges, by the statute which recognized the corporation and granting authority to construct the railroad; any citizen might have been a relator in place of the District Attorney.

The People vs. Halsey, 37 N. Y. Rep. 344.

The People vs. Collins, 19 Wend. 56.

This controversy is one between a State and a corporation of another State;—or the citizens of one State and a corporation of another State. By the Constitution of the United States, the judicial power of the United States extends to controversies between a State; and citizens of another State; and between citizens of different States.

The State, as plaintiff, is an embodiment of the citizens or people of the State, and is the conduit by which the citizens may convey to the judicial tribunals an infringement of a common right. The petition claims a common right for all the inhabitants under the Constitution of Mississippi, and the compact made when she came into the Union.

The jurisdiction of the court over the parties, would follow for tehm cases of

McNutt vs. Blond, 2 How. 1.

Brown vs. Strode, 5 Cr. 303.

Second.—The claim made in the petition to the Circuit Court for Hancock county, founded upon the Act of 1875, is deemed to be well founded. That act *empowered* the corporation to construct, build and maintain bridges over and across the navigable waters of the United States, on the route of this railroad between New Orleans and Mobile, for the use of the Company; and when completed, and in use in accordance with this act and the laws of the States, through which it

shall pass, shall be deemed and recognized as lawful structures and a post road, and are declared to be such.

It must be observed that along the line of this coast, and connecting these cities, a post road was nearly, if not quite impracticable. No attempt to make one has been made before this. The longest bridges in the United States are those which cross the bays and rivers mentioned in the Act of Congress.

The intercourse through three States is affected by the Act of Congress. The bridge which is subject to this judgment, is within two States. Congress empowered and authorized the construction of bridges in advance of expenditure by the Company. The work has been done at great and ruinous expense. Some six years after completion and use, a petulant complaint is made.

Congress has power to establish post offices and post roads. It has power to regulate commerce among the States. If needful, the channel for commerce or the construction of the road for postal intercourse, may be provided by appropriations of public money, or may be preserved by legislative enactments. The trust confided to Congress was the diffusion of information among the inhabitants of the United States; the transmission and circulation of intelligence to promote the business of society in its civil, personal and political relations. It was to communicate knowledge of the laws and acts of government. Such a trust cannot be executed without a delegation of power

to Congress, commensurate with work to be performed.

The answer pleads what the petition of plaintiff in the suit admits, that the bridge was completed and used as a public highway, and as a post road for some years prior to the commencement of this suit. It could not have been contemplated by Congress that the commerce along this highway, or the transportation of its mails could be obstructed by the Circuit Court of Hancock county, upon a notice of a few days. The Act of Congress contains a reservation to Congress, of "a right to alter or amend that act so as to prevent or remove all material obstructions to the navigation of the rivers growing out of the construction of the bridges," as allowed by that act.

The facts disclosed in the petition for removal of the cause, and upon the answer filed it the Circuit Court of Hancock county, show a question arising under the laws of the United States, and the existence of a right existing under those laws. The right has not been admitted by the Circuit Court of the county of Hancock, or by the Supreme Court of Mississippi, but we insist that the defendant had a title to a decision of the courts of the United States, it being a necessary question in the cause.

III.

Conceding now that the right of removal be not established, and that the Courts of Mississippi, have a jurisdiction over the suit, and a right to pass a judg-

ment, there remains the question whether under the Section 709, of the Revised Statutes of the United States, the judgment of the Supreme Court of the State of Mississippi may be reviewed and reversed by this Court.

The Congress of the United States, the Legislatures of the States of Mississippi and of Louisiana, respectively agree in a grant of power to the corporation to construct, maintain and use bridges over and across the navigable waters of the United States, on the route of the railroad between New Orleans and Mobile, for the use of the Company, and the passage of trains of cars, passengers, mails and merchandise, thereon.

In each of the acts of those bodies, there are exceptions to the generality of the grant, by clauses, requiring that the bridges over certain of the water courses on the route shall have openings for the passage of vessels.

The Act of Congress makes such a requirement in reference to the East Pascagoula river; the Bay of Biloxi; the Bay of St. Louis; and the Rigolets.

No mention is made of the Pearl river in the Act of Congress.

The State of Louisiana excepts from the grant or modifies the grant by a requirement of a *draw bridge* of a defined description over the Great Rigolet. And a provision is made that over the Pearl river there

shall be a draw bridge for the passage of vessels of not less than sixty feet in width.

But, except in case the Company shall locate their road across the Great Rigolet, at a point south of, or below, the principal entrance of Pearl river, into the Great Rigolet, then the Company shall only be required to construct one draw bridge, which shall be in the channel of the Rigolet before mentioned.

The authority of Louisiana is then ample to justify the erection of the bridge over the portion of the Pearl river, flowing through that State. The act of the State of Mississippi, is to the same effect. That act provides, "that in case the Company shall locate the line of their road across the channel of the Rigolet, at a point south of, or below, the principal entrance of Pearl river, into the Rigolet, *then* the said Company shall not be required to construct a draw bridge across any bayou leading into Pearl river, or across any small pass or mouth of said river. The Supreme Court of Mississippi to sustain its construction of the act interpolates into the act the word "small," before the word "mouth," and thus the clause is in their judgment, "across any small pass or small mouth of the river." But the boundary of Mississippi is the eastern mouth of the river.

The State has no jurisdiction over any portion of the river but that which lies east of all the passes and sub-divisions of the river. In this act, as well as that of Louisiana, the aim was to preserve the connection

between the Pearl river and the Rigolets open to navigation. The products of fruit, fish and lumber were carried to New Orleans through that channel, and this supplied their entire wants.

The Act of Congress, adopted after the Mississippi act. makes no mention of Pearl river, for the reason, probably, that the location of the railroad had been made, and the present line adopted.

The Supreme Court of Mississiippi is not supported by the acts in its assertion that a drawbridge is obsolutely required across the channel of Pearl river where it divides Mississippi and Louisiana. The acts of Louisiana and Mississippi both require a draw-bridge over Pearl river with a draw-bridge in case the routeof the railroad isabove the juuction of the middle or western branches of Pearl river with the Great Rigolets.

In this event these branches might be crossed by bridges without any openings, and thus their navigagation might be obstructed. The object was to preserve one entrance into the Mississippi sound from Pearl river. The Company might select the route. The Company might leave the pass through the rigolets or that through Lake Borgne free; one or the other must be free from obstruction; one or the other might be passed on a bridge without any opening.

IV.

The Supreme Court of Mississippi conclude that the Act of Congress pleaded in answer by the Railroad

Company, and stated in the petition for removal of the cause as a muniment of title to construct and employ the bridge over the Pearl river, for the use of the Company, has no value; that all the matter involved of estate and title in the privilege, is the Statute of Mississippi, and that they have construed to the prejudice of the company. There are two separate subjects of legislation comprised in the Act of Congress, and with distinct aims, though germane to one another. 1st. The corporation is at once, and by the declarations of the act authorized and empowered to construct, build and maintain BRIDGES over and across the navigable waters of the United States, on the route of said railroad between New Orleans and Mobile, for the use of the Company, and the passage of its engines, cars, trains of cars, passengers, mails and merchandise, thereon.

Were there no other authority than this, we hold that the bridges might be built and maintained. We hold that Mississippi could not hinder nor prevent the construction of the bridges for such an object, under such a license.

Congress, by this act, assumed that the construction and maintenance of bridges over the navigable waters of the United States, and over the Pearl river forming the boundary of two States, and a part of which is in each State, was necessary and proper:

1st. For the transportation of the mail over that river, in cars;

2d. For the transportation of commercial vehicles, passengers and merchandise, from one State to another State;

3d. It might serve for the defence of the country. In the late war, Congress appropriated the railroads, and extended and built them for military purposes.

Congress, after empowering and authorizing the Company to construct and build the BRIDGES, then proceeded to say, that the railroad and its bridges when constructed, completed and in use according to this act and the laws of the several States, through whose territory the same shall pass, shall be deemed, recognized and known as lawful structures, and a post road, and are hereby declared as such.

We assume as the proper interpretation of this act, that Congress regarded the *bridges* to have existence as lawful structures by their construction under the authority conferred by Congress, and that the railroad was indebted to Mississippi and other States, for all of its faculties. Congress adopted it as a post road when completed, and declared it to be a post road.

When was it, that the bridges became lawful structures, and when was it that the railroad became a post road? It was when the road was constructed, completed and in use. The petition of the plaintiff avers maintenance and use of the railroad and bridges since 1870.

When Congress declares that a railroad, and its bridges constructed under the specific authority of

Congress to be lawful structures, and to be recognized as such, and a post road, then the right and the duty to exercise a conservative control and protection over such structures, seems to be implied.

An authority to establish a post road through a wilderness, and to erect bridges as an essential part of the road, is conceded to Congress. If Congress, as an incentive to a corporation to construct, build and maintain the road or bridges for such purposes, declares that they shall be deemed, recognized and known as lawful structures, it follows that the citizens of the United States, shall respect them as such, and that the government shall support them as such. The powers to establish post roads, regulate commerce among the States, and to support armies and provide for common defence, were entrusted to Congress without restriction or limit.

The powers were not to remain dormant, but to be actively employed. A case for that employment is stated in this act.

It follows that the State authorities cannot denounce and destroy these structures contrary to the will, and in contradiction of the grant of the Congress.

V.

The Mississippi territory was organized by Acts of Congress, approved 7th April, 1798, and the 10th of May, 1800, before the acquisition of any title in the soil.

Jurisdiction and ownership of soil were acquired by the compact with the State of Georgia, which bears date 24th April, 1802. The southern boundary of this territory was the 31st degree of north latitude, the southern boundary of the United States.

In 1812, the Congress of the United States asserted the right to sovereignty and occupation of the disputed territory between the Iberville and Perdido rivers. The territory west of the eastern branch of the Pearl river, was attached to Louisiana, and the territory east of that branch of Pearl river was attached to the Mississippi territory. 2 Stats. 708; 3 Stats. 348.

The States of Louisiana and Mississippi were admitted to the Union with these limits.

In all the legislation of the United States relative to the northwest and the southwest territories, and that was extended to the acquisitions from France, Spain and Mexico, and to the State of Texas, navigable rivers are declared to be public highway, free and common to the citizens of the United States. This common right of all of the citizens existing by compact, and reserved by the United States as the owner of public lands and territorial rights, by the first section of the fourteenth amendment of the Constitution, was protected from encroachments from State legislation, and placed under the control of Congressional legislation. No State may pass any law to impair or to abridge the common public right. Hence the act

of Congress before mentioned in favor of the New Orleans, Mobile and Chattanooga Railroad Company, properly assumed the form of a grant, and is a source of legal right and title.

The action of the Court of Mississippi, in directing the abatement of the bridge over the Pearl river, impairs the right conceded in that act.

The same action impairs the rights granted by Louisiana over the Pearl river in that State. Congress, in the act, reserved a power to determine whether there should be a change in its conditions.

VI.

The question finally depends upon the extent of the powers of Congress over the subject of the act.

The power of the United States to provide a system of internal improvement, coextensive with the limits of the Union has been maintained by statesmen of eminent ability, and of men having great influence upon the Councils of the Union. Mr. Gallaten recommended in a report submitted in 1809, and Mr. Calhoun afterwards, as Secretary of War, a system of improvement embracing military, commercial, postal and industrial necessities and facilities. In the discussions, the power to legislate was vindicated under the grant of authority to Congress to establish post offices and post roads; to regulate commerce among the States; to raise and support armies and provide

for the common defence, and to make laws for carrying into execution the powers granted to Congress.

In respect to the navigable waters of the United States, this court has recognized the authority of the United States, as paramount to that of the States.

South Carolina vs. Georgia, 93 U. S. 4.
Pennsylvania vs. Belmont Bridge, 18 H. 421.
Clinton Bridge, 10 Wall. 454.

J. A. Campbell
Thos. L. Burke for Peffer & E

APPENDIX.

AN ACT

To establish and declare the Railroad and Bridges of "The New Orleans, Mobile and Chattanooga Railroad Company," as hereafter constructed, a post road, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That The New Orleans, Mobile and Chattanooga Railroad Company is hereby authorized and empowered to construct, build and maintain bridges over and across the navigable waters of the United States on the route of said railroad between New Orleans and Mobile, for the use of said Company, and the passage of its engines, cars and trains of cars, passengers, mails and merchandise thereon; and said railroad and its bridges aforesaid, when constructed, completed and in use, in accordance with this Act and the laws of the several States through whose territory the same shall pass, shall be deemed, recognized and known, as lawful structures and a post road, and are hereby declared as such: *Provided, however*, That the said Company, in the construction of its bridges over and across the waters known as the East Pascagoula river, the bay of Biloxi, the bay of Saint Louis, and the Great Rigolet, shall construct and maintain drawbridges in the channels thereof, which, when open, shall give a clear space for the passage of vessels of not less than eighty feet in the channels of the East Pascagoula river, and of the bay of Biloxi, and of the bay of St. Louis; and of not less than one hundred feet in the channel of the Great Rigolet; and said Company shall at all times open the said drawbridges, and shall provide reasonable and necessary facilities for the passage of all vessels requiring the same, except during and for ten minutes prior to and after the time of the passage of the mail and passenger trains of said Company.

SECTION II. *And be it further enacted*, that the right to alter or amend this Act, so as to prevent or remove all material obstructions to the navigation of said rivers, growing out of the construction of said bridges, is hereby expressly reserved.

B. F. WADE,
President of the Senate.
SCHUYLER COLFAX,
Speaker of the House of Representatives.

Approved, March 2d, 1868.

ANDREW JOHNSON,
President of the United States.

AN ACT

In relation to "The New Orleans, Mobile and Chattanooga Railroad Company," a corporation of the State of Alabama, and authorizing and empowering said company to exercise and enjoy its corporate powers and franchises, in the State of Mississippi.

SECTION I. *Be it enacted by the Legislature of the State of Mississippi*, That The New Orleans, Mobile and Chattanooga Railroad Company, a corporation incorporated, organized and existing under and by virtue of its Act of incorporation, duly enacted by the Legislature of the State of Alabama, entitled, "An Act to Incorporate the New Orleans, Mobile and Chattanooga Railroad Company. Approved November 24th, 1866, is hereby recognized and approved as a body politic and corporate, with all the powers, privileges, rights and franchises granted to it by said State of Alabama, in and by its said Act of incorporation, hereby adopting, confirming and approving all the provisions of said Act of incorporation granted to said Company, so far as the same may be applicable to this State, and may be adopted, approved and confirmed thereby, and are not contrary to the general statutes thereof. The said Company is hereby invested with the powers, privileges and franchises granted to it, in its said Act of incorporation, and is empowered and authorized to exercise and enjoy the same in this State, and to have, exercise and enjoy all the rights, powers, privileges and franchises, pertaining to corporate bodies within this State, necessary for the full enjoyment and exercise of the said rights, powers, privileges and franchises, granted and secured to it by its said Act of incorporation, and necessary to secure, attain and accomplish the objects and purposes of its incorporation, in the same manner,

and with like power and effect, as if said Company had been incorparated by virtue of any grant or law of this State, subject only to the conditions, provisions and restrictions of this Act, as hereinafter set forth, in the general laws of this State.

SECTION II. *Be it further enacted,* That to enable said Company to accomplish the purposes and objects of its incorporation, the furtherance and pursuance of which, in this State, are hereby granted, the said Company is empowered and authorized:

First. To construct and maintain, and thereafter to own, maintain, manage and use a railroad, with such tracks and suitable turn-outs, and upon such a course or route as may be deemed, by a majority of the directors of said Company, most proper, expedient or necessary, and best adapted for the public accommodation, from any point on the line between this State and the State of Louisiana, and thence towards, or to any point on the line between this State and the State of Alabama, crossing and passing through this State, between said points, with the power and authority to extend the said railroad, as contemplated in said Act of incorporation, from the western boundary of this State, towards and to New Orleans, in the State of Louisiana, and from the eastern boundary of this State, towards and to the city of Mobile, in the State of Alabama, and thence to other places, as provided in said Act of incorporation.

* * * * * * * * * *

Sixth. To construct and maintain its said railroad, or any part of the same, and to have the right of way therefor, across or along, or upon any waters, water-course, river, bay, inlet, street, highway, turnpike or canal, within this State, which the course of said railroad may intersect, touch or cross; Provided the said Company shall preserve any water-course, street, highway, turnpike or canal, which its said railroad may pass upon, along, intersect, touch or cross, so as not to impair its usefulness to the public unnecessarily; or if temporarily impaired in and during the construction of said railroad the said Company shall restore the same to its former state, or to such a state that its usefulness and convenience to the public shall not be unnecessarily or materially impaired or injured; and it is also provided that said Company is authorized and empowered to construct and maintain its said railroad over and across any of the waters of this State, on the line of the same by bridges; *Provided, however,* that in the central por-

tion of the channel of the Pearl river, of the bay of St. Louis, of the bay at Biloxi, and of the East Pascagoula river, and in each of them said Company shall construct and maintain a drawbridge, which, when open, shall give a clear space for the passage of vessels of not less than sixty feet in width; and said Company, after the construction of the said drawbridges, shall at all times thereafter provide, that said drawbridges shall be opened for the passages of any and all vessels seeking to pass through the same without unnecessary delay. *Provided, however, that in case the Company shall locate the line of their road across the channel of the Rigolet, at a point south of (or below) the principal entrance of Pearl river, into the Rigolet, then the said Company shall not be required to construct a drawbridge across any bayou leading into Pearl river, or across any small pass or mouth of said river.* It is also provided that such part of this section as relates to Pearl river, if the line of the road shall be located across the said river at a point where it constitutes the boundary line between the State of Mississippi and the State of Louisiana, shall not take effect until the State of Louisiana has consented to and authorized the same, or said Company has built such a bridge across said Pearl river, for its said railroad, as shall be in accordance with this section, and also with any authority or power granted to said Company by the said State of Louisiana in the premises; and such drawbridge may be built in the centre of the channel of said Pearl river, or in that portion of the same within the territory of the State of Louisiana, or of this State, as most convenient for public use.

AN ACT

Relative to "The New Orleans, Mobile and Chattanooga Railroad Company," a corporation of the State of Alabama, and authorizing and empowering said company to exercise and enjoy its corporate powers and franchises, in the State of Louisiana.

SECTION I. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened*, That The New Orleans, Mobile and Chattanooga Railroad Company, a corporation, incorporated, organized and existing under and by virtue of its Act of incorporation, duly enacted by the Legislature of the State of Alabama, entitled, "An Act to Incorporate the New Orleans, Mobile and Chattanooga Railroad Company," Approved November

24th, 1866, and amended by an act approved February 12th, 1867, is hereby recognized and approved as a body politic and corporate, with all the powers, privileges, rights and franchises granted to it by the said State of Alabama, in and by said Act of incorporation, hereby adopting, confirming and approving all the provisions of said Act of incorporation, granted to said Company, so far as the same may be applicable to this State, and may be adopted, approved and confirmed thereby. The said Company is hereby invested with the powers, privileges and franchises granted to it, in its said Act of incorporation, and is empowered and authorized to exercise and enjoy the same in the State of Louisiana, and to have, exercise and enjoy all the rights, powers, privileges and franchises pertaining to corporate bodies within the said State of Louisiana, necessary for the full enjoyment and exercise of the said rights, powers, privileges and franchises granted and secured to it by its said Act of incorporation, and necessary to secure, attain and accomplish the objects and purposes of its incorporation in the same manner, and with the like power and effect, as if said Company had been incorporated by virtue of any grant or law of this State, subject only to the conditions, provisions and restrictions of this Act, as hereinafter set forth.

* * * * * * * * * *

Eighth. To construct and maintain its said railroad, or any part of the same, and to have the right of way therefor, across, or along, or upon any waters, water-course, river, lake, bay, inlet, street, highway, turnpike or canal, within the State of Louisiana, which the course of said railroad may intersect, touch or cross, provided the said Company shall preserve any water-course, street, highway, turnpike or canal, which its said railroad may so pass upon, along, intersect, touch or cross, so as not to impair its usefulness to the public unnecessarily; or if temporarily impaired in and during the construction of said railroad, the said Company shall restore the same to its former state, or to such a state that its usefulness and convenience to the public shall not be unnecessarily or materially impaired or injured; and it is also provided that said Company is authorized and empowered to construct and maintain its said railroad over and across the waters of the State of Louisiana, known as the Pass Chef Monteur, Little Rigolet, Great Rigolet, or that part of Lake Pontchartrain east of the west line of Point aux Herbs; and the West Pearl river and other streams and bayous between Lake Pontchartrain and Pearl river, and Pearl river by bridges;

provided, however, that in the channel of the Great Rigolet, or in the channel of that part of Lake Pontchartrain hereinbefore named, there shall be constructed and maintained by said Company a drawbridge, which, when opened, shall give a clear space, for the passage of vessels, of not less than one hundred feet in width; and in the channel of the Pearl river, the said Company shall construct and maintain a drawbridge, which, when open, shall give a clear space, for the passage of vessels, of not less than sixty feet in width; except in case the Company shall locate their road across the Great Rigolet, at a point south of (or below) the principal entrance of Pearl river into the Great Rigolet, then the Company shall only be required to construct one drawbridge, which shall be in the channel of the Great Rigolet, as hereinbefore named; and said Company, after the construction of the said drawbridges or drawbridge, shall at all times thereafter provide that said drawbridges or drawbridge shall be opened for the passage of any and all vessels seeking to pass through the same, without unnecessary delay. It is also provided, that such part of this section as relates to Pearl river, if the line of the road shall be located across the said river at a point where it constitutes the boundary line between the State of Louisiana and the State of Mississippi, shall not take effect until the State of Mississippi has consented to, and authorized the same, or said Company has built such a bridge across the said Pearl river, for its said railroad, as shall be in accordance with this section, and also with any authority or power granted to said Company by the State of Mississippi, in the premises; and such drawbridge may be built in the centre of the channel of said Pearl river, or in that portion of the same within the territory of the State of Mississippi, or of this State, as most convenient for public use.

FILED
OCT. 14, 1880

Supreme Court of the United States.

OCTOBER TERM, 1880.—No. 37

NEW ORLEANS, MOBILE & TEXAS RAILROAD CO.

vs.

THE STATE OF MISSISSIPPI.

FROM THE SUPREME COURT OF MISSISSIPPI.

BRIEF OF A. M. CLAYTON,
For the State.

WASHINGTON, D. C.:
R. O. POLKINHORN, PRINTER,
1880.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1880.

THE STATE OF MISSISSIPPI,

DEFENDANT IN ERROR,

ads.

NEW ORLEANS, MOBILE & TEXAS R. R. CO.,

PLAINTIFF IN ERROR.

The Facts of the Case.

On the 1st day of June, 1875, the State of Mississippi, at the relation of one of its district attorneys, filed a petition in the proper court to abate a nuisance, which it alleged had been committed by the plaintiff in error, by the erection of a bridge, *without a draw*, over Pearl River, a navigable stream within the limits and jurisdiction of the State of Mississippi. The petition states that the railroad in question was first incorporated by the State of Alabama, but was afterwards, by an act, approved February 7th, 1867, "authorized and empowered by the State of Mississippi to exercise and enjoy its corporate powers and franchises in the State of Mississippi."

This charter authorizes the company to construct and use a railroad from the city of Mobile to the city of New Orleans, through parts of the States of Alabama, Mississippi and Louisiana, and to build it over and across any of the waters of the State, on the line of the same." Then comes in the following proviso, the proper construction of which is the sole point in the case, in our view: "*Provided, however*, that in *the central portion of the channel of Pearl River*, of the Bay of St. Louis, of the Bay of Boloxi, and of the east Pascagonla River, and in *each* of them, said company shall construct and maintain a drawbridge of sufficient size to allow vessels to pass; *and provided, also*, that in case the company shall locate the line of their road across the channel of the Rigolets at a point south or below the principal entrance of Pearl river into the Rigolets, then the company shall not be required to construct a drawbridge across any bayou leading into Pearl river. or across any *small* pass or mouth of said river." There is a further provision in the law that it should not take effect if the road should cross the river at a point which forms the boundary line with Louisiana until that State had consented to its terms.

The petition goes on to state that the company had completed and kept up its road since the year 1871, but had neglected and failed to construct a drawbridge in and over the central portion of Pearl river, but had constructed a bridge without any draw, which obstructs the navigation of said river, and is a public nuisance."

Petition prays for a mandamus to abate the nuis-

ance, or to compel the erection of a draw-bridge over the central portion of Pearl River.

The railroad company filed an answer, in which it averred an exact performance of all the terms of the charter, "except in reference to the central portion of Pearl River." As excuse for failure in this particular, it relies on the proviso above set forth, and on the terms of the act of Louisiana, passed in 1868, authorizing the company to exercise and enjoy its corporate powers in that State. This act of the Louisiana Legislature provides "that in the channel of the Pearl River the company shall construct and maintain a draw-bridge, (of certain dimensions,) except in case it shall locate their road across the Great Rigolet, at a point south of (or below) the principal entrance of Pearl River into the Great Rigolet; then the company shall only be required to construct one draw-bridge, which shall be in the channel of the Great Rigolet. It further provides that such part of the act as relates to Pearl River, if the line of the road shall be located across the said river, at a point where it constitutes the boundary between Louisiana and Mississippi, shall not take effect until the State of Mississippi has consented to and authorized the same, or said company has built such a bridge across said Pearl River as shall be in accordance with this section *and also with any authority or power granted to said company by the State of Mississippi in the premises.* The consent of Mississippi above required was never given.

The answer also relies on the act of Congress ap-

proved March 2, 1868, as a defense. That act authorizes the company to construct, build, and maintain bridges over and across the navigable waters of the United States on the route of sail railroad between New Orleans and Mobile, and enacts that said railroad and its bridges, *when* constructed and completed and in use, in accordance with this act *and the laws of the several States* through whose territory the same shall pass, shall be deemed, recognized, and known as lawful structures and a post-road, and are hereby declared as such."

This act of Congress also prescribes the dimensions of the draw-bridges over East Pascagonla River, the Bay of Biloxi, the Bay of St. Louis, and the Great Rigolet, but omits all mention of Pearl River.

Upon the filing of the answer, a petition was presented to the court by the railroad for the transfer of the cause to the Circuit Court of the United States for the southern district of Mississippi, which was refused.

A demurrer was then filed to the answer, which was sustained, and a mandamus awarded, in accordance with the prayer of the information. From this decision the case was taken by writ of error to the Supreme Court of Mississippi, was there affirmed, and is thence brought by writ of error to this court.

The statutes of Mississippi and Louisiana, and the Act of Congress, are appended to the brief of counsel for plaintiff in error, and reference is here made to them.

II.

Application to Remove Cause.

ARGUMENT.

The first point to be considered is the refusal of the State court to transfer the case to the Circuit Court of the United States. The Court based its refusal to remove upon the ground that the case was not within the Act of Congress of March 3, 1875, upon which the application to remove was made. The words of that act are, in substance, "that any suit of a civil nature, at law or in equity, in a State court, arising under the constitution or laws of the United States, or in which the United States shall be a plaintiff or petitioner, or in which there shall be a controversy *between citizens of different States*, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign states, citizens or subjects, either party may have the case removed to the Circuit Court of the United States."

There is nothing in the character of the parties which brings this case within the terms of this law. It is not a controversy between citizens of different States. Conceding, according to the decision in *Cohens* vs. *Virginia*, 6 Wheat., that for the purposes of this writ, the State of Mississippi may be treated as an individual, I submit that this railroad is a citizen of Mississippi, so far as it has any franchises or rights or powers in that State. A corporation is regarded as a citizen of the State which granted its charter—

and if chartered by two States, it has no legal existence except by the law of the State. Neither State could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. Its place of residence is where it is created, and can be nowhere else.

Ohio & Miss. R. R. vs. *Wheeler*, 1 Black, 297;
Muller vs. *Dows*, 4 Otto, 444;
Bank of Augusta vs. *Earl*, 13 Peters.

The petition sets out that "the plaintiff in error is a company incorporated by the State of Alabama, and which is recognized in the Act of the Legislature of Mississippi." The claim which it asserts here arises out of the Legislation of Mississippi. That legislation "adopts, confirms and approves" the act of incorporation of Alabama so far as applicable to Mississippi, and its effect is exactly the same as if the whole charter of Alabama had been re-enacted; but the charter of Alabama is of no force in Mississippi. Whatever rights or powers the road has in Mississippi are derived from the enactment of that State. There it was created by that State, "and there is its residence and can be no where else," as to all matters in Mississippi. For the purposes of this suit, it is a citizen of Mississippi, and not of a different State, and is, consequently, not entitled to a removal of the cause, as prayed for. It matters not when this objection is taken—if well-founded, it must be regarded as fatal to the case (4 Otto, 445), and I so regard it here.

Subject-Matter.

As to the subject-matter as cause of removal, the petition claims it on the ground "of a vested right resting on a contract," and supported and sustained by the constitution of the United States, and that this cause is one arising under the constitution of the United States.

Record, page 13.

The case of *Gold Washing Co.* vs. *Keyes*, 6 Otto, furnishes the rule for determining questions of this kind. It says a petition for removal is insufficient, unless it sets forth, in due form, the essential facts not otherwise appearing in the case, which, under the Act of Congress, are conditions precedent to the change of jurisdiction. The Act of Congress in regard to the road referred to in the petition, and set out in the brief of counsel for plaintiff in error, recognizes the laws of Mississippi on the subject of the bridges, and requires compliance with them. The whole question, therefore, is whether the railroad has complied with those laws.

The charter granted by Mississippi was approved February 7, 1867: that of Louisiana in August, 1868, and the act of Congress March 2, 1868. The statute of Mississippi out of which this controversy grew is prior to the others, and is absolute and imperative in requiring a bridge to be maintained across the central portion of Pearl River, and this injunction the State has never varied or departed from. It is not at all affected by the subsequent proviso, "that if the

road should be located across the Rigolet, at a point south of or below the principal entrance of Pearl River into the Rigolet, the company should not be required to construct a draw-bridge across any bayou leading into Pearl River, *or across any small pass or mouth of said river.*" It would seem to be clear that this exemption was not designed to be extended to the previous requirement of a draw-bridge over the central portion of the channel of Pearl River.

The statute of Louisiana enacts that so much of it as relates to Pearl River, if the line of the road should be located at a point where it constitutes the boundary between the two States, shall not take effect until the State of Mississippi has consented to and authorized the same, or said company has built such bridge across the said Pearl River for its said railroad *as shall be in accordance with this section, and also with any power or authority granted to said company by the State of Mississippi in the premises.*

The act of Congress authorizes the road to build bridges across the navigable waters of the United States on its route, and directs that said railroad and its bridges aforesaid, *when* constructed, completed, and in use, in accordance with this act *and the laws of the several States* through whose territory the same shall pass, shall be deemed, recognized, and known as lawful structures and a post-road, and are hereby declared as such.

It will thus be seen that the State of Louisiana and the Congress of the United States both, in their acts on this subject, recognized the law of Mississippi as

valid and binding on the road, and made compliance with it a condition precedent to the vesting of its rights under their respective acts.

It can, therefore, in no just sense be said "that the road had a right vested by its contract with the State of Mississippi, and that this right is supported by the Constitution, and that the cause is one arising under the Constitution," when it has never complied with the condition upon which alone its right was to vest. The effort by Mississippi to compel a compliance with the terms of its grant can in no wise be regarded as a breach of its grant. An estate, to vest upon the happening of a future lawful event, or the performance of a certain act, never vests until the condition is complied with. 4 Kent 126

It is confidently submitted that no right of the road has been infringed, and that it has presented no case arising under the Constitution. The refusal to transfer the case was, therefore, no error.

III.

The Merits of the Case.

Much of what has already been said, in regard to the application for the removal of the case, is applicable, in all its force, to the merits of the cause. Passing by the consideration as to whether the same reasons, which precluded the removal of the case, do not equally shut out the supervisory powers of this court over the judgment of the Supreme Court of Mississippi, some additional reasons will be presented, to show the correctness of that judgment.

20

No Federal Question Involved.

There was really no Federal question involved, without which, it is conclusively settled, the jurisdiction of this court could not attach. *Bank* vs. *McVeigh*, 8 Otto, 332. The whole case turns upon the construction of the statute of Mississippi, and there is no ground to hold that it is unconstitutional or in conflict with the law of Congress. On the contrary, the act of Congress in terms is subordinate to it. It is purely a construction of a statute of a State which is involved, and that construction emphatically belongs to the courts of the State.

Cooley on Con. Law, p. 16, and the numerous cases in this court cited.

It is not here intended to come in conflict with the case of *Jefferson Bank* vs. *Skelly*, 1 Black, 443, where it is said that when the court is called on to interpret the contracts of States, though made in the form of Statutes, it constitutes an exception to this general rule. In *Stone* vs. *Mississippi*, 101 U. S. Rep., 817, the court says: "In all such cases the first enquiry is whether a contract has been made. If there is no contract there is nothing in the grant on which the Constitution can operate."

My position is there is here no contract, and can be none until the railroad fulfils the offer of a contract by building a draw-bridge.

It is not perceived that the fact that Pearl river is the boundary between the two States at all diminishes the force of this position. The right of each stopped at the middle of the stream. Without mu-

tual consent and co-operation neither could have authorized the building of a bridge beyond its own territorial limits. Such an attempt would be nugatory. But there was concession by each State, and reciprocal agreement that the act of the one should be ineffectual till sanctioned by the other. The act of Congress recognized the validity of both, and interfered with neither. It virtually ratified them, and made its own grant dependent upon the road's carrying out the grant of the States.

It is said by the counsel for the plaintiff in error that the act of Congress is a grant, and a source of legal right and title. This would not be questioned if the Act was absolute in its terms; but the Act itself makes the grant dependent upon compliance by the road with the requirements of the statutes of the two States.

It is not to be doubted that the States may pass laws in regard to the navigable rivers within their limits until Congress legislates over them.

Sherlock vs. *Alling*, 93 U. S. Rep.;
Cooley Com. Law, p. 737;
18 Howard, 421.

If the State acts, and Congress recognizes and acknowledges the validity of its acts, it is the same thing, in effect, as if the legislation of Congress had been original. It adopts and makes the legislation of the State its own. In this instance its grant is only confirmatory of the State grant, and the road must rest its title upon the grant of the State as confirmed by

the Act of Congress. Of course, if there is any antagonism between an Act of Congress on this subject and the Act of the State legislature, the Act of Congress is paramount.

Penn. vs. *Belmont Bridge*, 18 How., 421.

It is, perhaps, not out of place to remark that in the petition the right to succeed is placed on the ground of *contract with the State* (R., p. 13,) and in the brief, at page 9, upon the Act of Congress, where it it said "the defendant claimed a right and authority to construct and maintain the bridge under the Act of Congress." Whether it claims under the one or the other, or under both, the result is the same; it has not complied with a condition, the building of a drawbridge, the performance of which was an absolute pre-requisite to the validity of a contract or the vesting of a right.

The omission of any mention of Pearl River in the act of Congress was, perhaps, unintentional, or might have been occasioned by the belief that it was already sufficiently provided for in the legislation of the two States. It can have no influence, because the act itself in effect directs that the railroad and its bridges shall be "constructed, completed, and in use in accordance with the act *and the laws of the several States* through whose territory the same shall pass, and *when* so completed shall be deemed a post road. As if to set all possible doubt to rest as to the meaning and intent of the two States in regard to the bridge across Pearl River, the *concluding* sentence in the law of each State is, "and such draw-bridge may be

built in the centre of the channel of said Pearl River, or within that portion of the same within the territory of either State, as most convenient for public use." (Statutes, at pages 4 and 6 of appendix to brief of plaintiff in error.) This, their last expression on the subject, is conclusive as to their understanding of it.

It is not perceived that the historical disquisition of counsel as to the nature and origin of the title of the territory of Mississippi to its soil has any practical bearing. Carolina and Georgia had disputes in reference to it, which were all settled, and the boundaries of the original territory greatly enlarged, before the State was admitted into the Union.

Montgomery vs. *Ives*, 13 Smedes & Marshall's Miss. Rep.

The region between the 31st parallel and the Gulf was occupied by the Spaniards as our ally during the Revolutionary War, and Spain afterwards set up title to it. This court decided this claim on the part of Spain to be invalid, and in 1812 Congress took possession and extended its jurisdiction over it as far as the River Iberville. This came near producing war between the two governments, but the dispute was finally amicably adjusted.

Harcourt vs. *Gaillard*, 12 Wh., 523;
Henderson vs. *Poindexter*, *Ib.*, 530.

When Mississippi was admitted into the Union in 1817, her boundary, so far as relates to this controversy, was fixed at a point where its eastern bound-

ary line strikes the Gulf of Mexico; "thence westwardly, including all islands within six leagues of the shore, to the most eastern junction of Pearl River with Lake Borgne; then up said river to the 31st degree of north latitude." The diagram hereto annexed is intended to present this line more clearly.

The act under which the territory of Mississippi was admitted into the Union as a State, passed on 1st March, 1817, provided that the Mississippi River and the navigable rivers and waters leading into the same, or into the Gulf of Mexico, shall be common highways and forever free, as well to the inhabitants of said State as to the other citizens of the United States.

Act of 1817, vol. 3, page 349, Stat. at large.

This constituted a compact. The State was admitted under it, and has a right to expect the United States to keep it inviolate. The act of Congress, with my construction of it, does not trench upon this guaranty; but if, as claimed by the plaintiff in error, it grants a right to erect a bridge across the Pearl, a navigable river, without a draw, it is no longer a free highway to the Gulf. If any fair construction of the act of Congress will relieve it from this imputation, and leave the river free and open, it will be adopted; but if, by its terms, the navigation of Pearl River is obstructed, then it is a violation by one of the parties of the terms on which the State was admitted. This would be, not to regulate but to destroy an avenue of commerce. Not even this great nation has power to break its own contracts.

Steamboats ascend Pearl River to Jackson, the capital of the State, some 200 miles from its mouth. The country adjacent is in the process of gradual development. It is being attempted to build up a shipping point at or near its mouth, open to ship communication with all the world, having one of the best harbors on the whole Southern coast. If this obstruction to the navigation of the river is retained, its whole trade is forced by a narrow channel and a circuitous route to New Orleans. This, according to the Wheeling and Belmont Bridge case, above cited from 18 Howard, does not violate the Constitution by giving a port of one State a preference over that of another, but it certainly affords an argument against a construction which would lead even indirectly to such a result. It practically takes away from Mississippi all advantage from one of her largest rivers; and this may be a main cause of the sparse population of which the plaintiff in error speaks.

It is not, as alleged, "personal or local enmity," on the part of the people of Mississippi, which has prompted their action, but an honest desire to use the unimpeded waters of a great river for the growth and prosperity of their country. It looks to the government for the protection of this right, as it was promised.

The act of admission prescribed Pearl River as the boundary between Louisiana and Mississippi, from its mouth to the 31st parallel of latitude. Neither State has ever questioned that as the true line, and the railroad crosses it not far from its entrance into Lake Borgne.

If it be true that there is neither a small pass or mouth of Pearl River east of the main stream, that is a matter of no significance in the construction of the statutes of the two States. They are identical in purpose and almost in language, and it was necessary that they should be so in order that they might cover the water-courses in both States.

The insertion, or, as plaintiff in error puts it, the interpolation of the word small, in brackets, in the opinion of the court of Mississippi, was meant only to show that the adjective belonged to both pass and mouth, and to place in express language what is necessarily implied. The inclusion in brackets shows it was not intended to create the impression that it was part of the statute in terms.

The section of the map which is appended to this brief is of the date of 1823, the nearest to the admission of the State into the Union that can be found; it is a map of the two States that are concerned, and is, therefore, the best evidence of the true line of boundary between them. They have always acquiesced in it. The route of the main Pearl River is plainly delineated and shows that the passes or mouths from it are small, and no where the boundary line. A drawbridge over them would be superfluous, whilst one is indispensable to the free navigation of the River proper.

The question involved is—not as the plaintiff in error puts it, "the extent of the power of Congress over the subject," but the extent to which it has exercised its power; not what Congress may do, but

what it has done in the premises. It is insisted that the judgment of the State court was right.

In conclusion, I submit that the plaintiff in error has failed to show cause for the removal of the case: first, by the want of a proper party; second, for lack of an appropriate subject-matter under the law; third, he has shown no cause for the exercise of supervisory power by this court over the State court, because no Federal question was presented or decided or involved.

Lastly, if this court should not agree to this, then, that upon a proper construction of the statutes the judgment of the State court was correct.

All of which is respectfully submitted.

ALEX. M. CLAYTON,
Counsel for Def't in Error.



I, Ainsworth R. Spofford, Librarian of Congress, do hereby certify that the above map is a true copy of so much of the original engraved map of Mississippi and Louisiana, H. S. Tanner, as herein exhibited, and that said map was published A. D. 1823, and forms a part of a work entitled "A New American Atlas, containing maps of the several States, drawn and engraved on a uniform scale, from documents found in the public offices of the United States, etc." By Henry S. Tanner, Philadelphia, 1823.

In witness whereof, I have hereto subscribed my name and affixed the seal of my office, this 11th day of October, A. D. 1880.

[SEAL.]

A. R. SPOFFORD,
Librarian of Congress.

